Supreme Court, U.S.
FILED
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No. _____

In The

Supreme Court of the United States

CITY OF WEST HAVEN, WEST HAVEN PLANNING AND ZONING COMMISSION, DONALD LEWIS, AND DAVID SALDIBAR,

Petitioners,

v.

GEORGE THOMAS, BARBARA THOMAS, AND JOHN FINNELL,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Connecticut

PETITION FOR WRIT OF CERTIORARI

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Dated: October 27, 1999

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QUESTIONS PRESENTED

1. Does a municipal official violate an individual's rights under the Equal Protection Clause of the Fourteenth Amendment when the official treats the individual selectively, not because of the individual's membership in a suspect class or because of his exercise of a fundamental constitutional right, but solely because of the official's alleged personal animus for the individual?

2. When a municipal commission is a "final policymaker" on issues within its authority and acts by a majority vote, can a plaintiff establish a claim for municipal liability under 42 U.S.C. § 1983 by alleging and proving that only a minority of the members had personal animus towards him, particularly when the commission members with the alleged personal animus recuse themselves from voting?

LIST OF PARTIES AND AFFILIATES

The names of all parties to the proceedings before the Connecticut Supreme Court appear in the caption of the case. There are no corporate petitioners.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Connecticut Supreme Court.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court is reported at 249 Conn. 385, 734 A.2d 535 (1999). It is reprinted in the appendix to this petition ("Pet. App.") at 1-34.

JURISDICTION

The Connecticut Supreme Court entered judgment on June 29, 1999.[1] This Court has jurisdiction to review the Connecticut Supreme Court's judgment under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983. These constitutional and statutory provisions are reproduced in the accompanying appendix at Pet. App. 80-81.

STATEMENT

The Court recently granted a petition for a writ of certiorari to the Seventh Circuit in *Village of Willowbrook v. Olech*, 67 U.S.L.W. 3528 (U.S. Sept. 28, 1999) (No. 98-1288), a case that raises the identical equal protection issue set forth in the first question presented by this petition. By

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[1] Pursuant to section 77-1 of the Connecticut Rules of Appellate Procedure, judgment automatically entered on June 29, 1999, the date the decision appeared in the *Connecticut Law Journal*.

granting the petition, this Court has recognized the paramount importance of the first question presented, and the need to resolve a conflict between the federal circuit courts of appeal on that question.

The petition in *Village of Willowbrook*, however, arises out of a decision reversing a trial court's judgment dismissing respondent Olech's complaint pursuant to Fed. R. Civ. P. 12(b)(6). By contrast, this case arises out of a decision reversing a trial court's grant of judgment in favor of petitioners following respondents' presentation of their case-in-chief. Thus, as set forth below, this case, in contrast to *Village of Willowbrook*, presents the Court with a fully developed factual record upon which to evaluate the important Equal Protection Clause issues presented. This factual record will also assist the Court in recognizing the importance of granting this petition with respect to the second question presented.

Petitioners urge the Court to grant their petition, consolidate oral argument on the first question presented with argument in *Village of Willowbrook*, and order separate oral argument on the second question presented.

A. Respondents' Application for a Zone Change

Respondents are three individuals who own commercial property in West Haven, Connecticut.[2] In 1980, shortly before respondents purchased the property, it consisted of two separately zoned parcels, one designated C-2 (commercial local service) and another R3-2 (residential two family). Pet. App. 10. Respondents intended to lease the property for the purpose of operating it as an

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[2] The facts set forth below are drawn from the opinion of the Connecticut Supreme Court, which, in considering whether respondents had made out a prima facie case for violation of the Equal Protection Clause, viewed all of the evidence adduced by respondents and drew all inferences in the light most favorable to respondents. *See* Pet. App. 9.

amusement center, offering arcade games, pinball and pool tables. *Id.* at 9-10. While operation of a pool hall was permissible on C-2 zoned property, operation of a video arcade was considered an "accessory use," thereby requiring approval from the City of West Haven Planning and Zoning Commission (hereinafter "zoning commission" or "commission"). *Id.* at 10. Petitioner Donald Lewis ("Lewis"), then chairman of the commission, was "highly upset that a pool hall was [already] allowed there and he argued strenuously to prevent [respondents] from putting the video games there. . . . " *Id.* at 11. Nevertheless, respondents received the necessary approval and entered into a lease. In August 1981, respondents purchased the property and continued to operate it as an amusement center until 1984. *Id.*

After attempting, unsuccessfully, to lease the property for two years, respondents decided to develop condominiums on the property, a use prohibited under the existing zoning classification of the property. *Id.* On April 21, 1986, they filed a change of zone application with the zoning commission to change both parcels of property to an R-5 classification, which would permit condominium development. *Id.* at 12. The application was presented to the zoning commission on May 13, 1996, at which time petitioners David Saldibar ("Saldibar") and Lewis were, respectively, the chairman and vice chairman of the commission. *Id.*

During the hearing, Lewis characterized respondents' application as incomplete because it did not include a site plan application. *Id.* Despite clarification from the commission's director of planning that a site plan was not needed for a zone change application, Saldibar insisted that the hearing on the application should not proceed until respondents came back with "proper documentation." *Id.* After further discussions, Saldibar appeared to understand that a site plan was not required for a zone change application and the hearing

continued. *Id.* After several commissioners asked questions about the application, Lewis referred to respondents' prior use of the property, stating

> [t]his guy made plans for [the amusement center] instead of what he called for and a pool hall. . . . We gave this guy everything. Now he comes with this sh*t. He's a shrewdy.

Id. at 12-13. Saldibar then stated that he would "like to have this guy [c]ome back when he's ready," and Lewis responded by moving to "[d]eny with prejudice," before respondents had completed their presentation. *Id.* at 13. The director of planning instructed the commissioners that they had to listen to respondents. *Id.* Saldibar responded, "alright," and Lewis yielded, stating "[y]ou said we got to listen to him. We do, we listened to him. And that's all there is to it." *Id.*

The hearing continued. Several persons spoke against the proposal. Respondents' representative gave a rebuttal. *Id.* Then Lewis spoke, describing the history of the property and reiterating that the application should be denied because respondents had not submitted a site plan. He moved to deny the application with prejudice, thus requiring respondents to wait at least one year before resubmitting the application, and the remaining commissioners seconded the motion. *Id.*

Respondents exercised their statutory right to appeal the commission's decision to the Connecticut Superior Court. *See* Conn. Gen. Stat. § 8-8(b), *reprinted in* Pet. App. 87. That court found that "the record reflects a predetermination on the part of the commission based upon a desire for a site plan where none was required and a personal prejudice against plaintiff." Pet. App. 78. Accordingly, the court sustained the appeal, thereby providing respondents with the opportunity to request a

rehearing on their application before the zoning commission. The court, however, did not order the commission to grant the application.[3]

On June 23, 1987, the commission held a public hearing to reconsider respondents' application. *Id.* at 14. Saldibar and Lewis still held their positions as chairman and vice chairman of the commission. *Id.* During the hearing, the city mayor addressed the commission, reminding it that a temporary moratorium had recently been passed prohibiting the granting of applications to change zoning classifications to R-5. *Id.* Lewis inquired why the commission was being asked to reconsider respondents' application. *Id.* The city corporation counsel

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[3] Connecticut law imbues zoning commissions with broad, liberal discretion to act *or not to act* on a zone change application. *See Homart Dev. Co. v. Planning and Zoning Com'n of Town of Watertown*, 600 A.2d 13, 15 (Conn. App. 1991). Their function, which is legislative in nature, is to determine whether the requested zone change would be consistent with the town's comprehensive zoning plan and the public health, safety and welfare. *See Protect Hamden/North Haven from Excessive Traffic and Pollution, Inc. v. Planning and Zoning Comm'n of Town of Hamden*, 600 A.2d 757, 766-67 (Conn. 1991). On appellate review of a denial of such an application, the reviewing court may order a rehearing on the application if it appears from the record that the applicant was deprived of a fair hearing, as the courts did in this case when respondents exercised their statutory right to take an administrative appeal from the denial of their zone change application. Pet. App. 3, 87. But, given the breadth of the zoning commission's discretion, a reviewing court cannot actually order the commission to grant the application except under the rarest of circumstances. *See, e.g., Cascio v. Town Council of Town of West Hartford*, 256 A.2d 685, 686 (Conn. 1969). Those "rare circumstances" exist only when the existing classification of the property is "unjust, confiscatory or unconstitutional." *Id.* No such claim can be made in this case. Indeed, that is why respondents' Fifth Amendment Taking claim was rejected. Pet. App. 42.

informed them that respondents' appeal had been sustained. *Id.* Respondents' attorney then asked that alternates be appointed for Lewis and Saldibar, "in light of the court decision finding that [they] had predetermined the outcome of the hearing and the reason for the reversal was because of their vote." *Id.* at 14-15. Saldibar stated that the request was denied, but Lewis expressed concern that respondents would again appeal the commission's decision. *Id.* at 15. Saldibar and Lewis then sought the advice of corporation counsel, who recommended that alternates be appointed. *Id.* Respondents' attorney then read to Lewis and Saldibar the text of the court decision sustaining respondents' appeal, after which discussion continued in heated tones. *Id.*, n.19.

Saldibar continued to officiate over the hearing. *Id.* at 15. However, when the time came for the commission to vote on respondents' application, both he and Lewis recused themselves from voting. *Id.* The remaining members of the commission then voted on the application, denying it unanimously. *Id.*, n.20. Respondents again appealed the commission's decision. The Superior Court once again sustained respondents' appeal, holding that the commission acted with "predisposition and predetermination." *Id.* at 15, 73. Again, however, the court did not direct the commission to grant respondents' application.

B. Proceedings Below

Instead of requesting a third hearing on their application before the zoning commission, respondents elected to file this lawsuit under 42 U.S.C. § 1983 against petitioners in state court, originally asserting only federal and state due process and takings claims. *See* Pet. App. 4 n.7. Respondents later amended their complaint to include a federal equal protection claim. *See id.*

Petitioners moved to dismiss the claims asserted in the amended complaint and the trial court granted the motion as to all claims except for the taking and equal

protection claims. The court dismissed the due process claim in particular because respondents did not have a " 'clear entitlement' to the zone action [they] sought . . . , as the zoning authority retained wide discretion in regard to the zone classification," and therefore, they lacked a constitutionally protected property interest, the deprivation of which would have triggered Due Process Clause protections. *Id.* at 65.

The case proceeded to trial on the surviving equal protection and takings claims. At the close of respondents' case-in-chief, petitioners again moved to dismiss both claims, and the trial court granted the motion. The court dismissed the takings claim because respondents had not shown that the existing zoning classification of their property was confiscatory.[4] *Id.* at 42. As to the equal protection claim, the court held that while respondents had presented evidence of malice on the part of Lewis and Saldibar because they had treated respondents with "animosity and disdain," *id.* at 52, respondents had failed to present evidence that respondents were, in fact, treated differently from similarly situated zone change applicants. *Id.* at 55-56. As to the City and the commission, the court found that defendants had not demonstrated that the commission action "was based on anything other than the commission's exercise of its discretion, and not on the alleged malice of Lewis and Saldibar." *Id.* at 56. Respondents appealed, but they restricted their challenge to the dismissal of the federal equal protection claim. *Id.* at 5, n.9. Therefore, it is been conclusively determined that respondents have no valid due process or takings claims.

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[4] The court observed that "plaintiffs have not alleged or introduced any evidence to demonstrate that West Haven has [left] the property owner with no economically viable use of the land. In fact, the plaintiffs agree that the land, as presently zoned, has valuable use." *Id.*

The Connecticut Supreme Court posed the question before it as the "showing necessary to establish a prima facie case of federal equal protection violations against a city, its planning and zoning commission, and certain individual commissioners serving on the commission." *Id.* at 1. Respondents claimed that they had met that burden by presenting evidence that "Lewis and Saldibar had treated them maliciously and selectively in the consideration of their zone change application" and that a "municipal policy of the city caused the plaintiffs to be deprived of their constitutional rights." *Id.* at 2.

The Connecticut court agreed with respondents, relying principally upon two cases from the Second and Seventh Circuits: *LeClair v. Saunders*, 627 F.2d 606 (2d Cir. 1980), and *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995). The courts of appeal in those cases held that an equal protection claim is stated whenever a plaintiff alleges: 1) that a public official treated him selectively compared to others similarly situated; and 2) that the selective treatment was based on a malicious or bad faith intent to injure a person, even when unrelated to the person's membership in a suspect class or his exercise of a fundamental constitutional right.[5]

The court then considered the evidence that respondents had presented at trial. Viewing that evidence in the light most favorable to respondents, the court held that it supported an inference of malice on the part of Lewis and Saldibar towards respondents and, further, that petitioners treated respondents selectively because the site plan requirement that the commission appeared to have

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[5] Significantly, although the Connecticut Supreme Court phrased the issue before it as the evidentiary showing necessary to make out a prima facie case of a federal equal protection violation, the court's decision, like *LeClair* and *Esmail*, effectively determines the *pleading* standard for stating an equal protection claim based on allegations of maliciously motivated selective treatment.

imposed on them at the first hearing had not been imposed on other zone change applicants during the same time period. Pet. App. at 21-27. However, the court then concluded that, although Lewis and Saldibar had recused themselves from voting on respondents' application at the second hearing – at which no site plan requirement was imposed – the evidence permitted the inference that they were the "moving force" behind, and thus the cause of, the full commission's unanimous rejection of the application. *Id.* 27-28. Finally, the court concluded that the action of the commission in denying respondents' application constituted a municipal policy of the City of West Haven, thereby subjecting the city to liability for the commission's actions. *Id.* at 28-24.

REASONS FOR GRANTING THE WRIT

The Court has recently agreed to resolve the equal protection issue set forth in the first question presented by this petition. *See Village of Willowbrook v. Olech*, 67 U.S.L.W. 3258 (U.S. Sept. 28, 1999) (No. 98-1288). Thus, the importance of this constitutional question, and the need to resolve a conflict among the federal circuit courts, is already apparent to the Court and petitioners will not repeat those arguments here.

However, in contrast to *Village of Willowbrook*, which arises out of the district court's dismissal of a complaint pursuant to Fed. R. Civ. P. 12(b)(6), this case arises out of a trial court's grant of judgment in favor of petitioners at the close of respondents' case-in-chief. Thus, unlike *Village of Willowbrook*, this case presents the Court with a fully developed factual record upon which to consider and explore the equal protection issues raised by the first question presented. Petitioners urge the Court to grant their petition and consolidate oral argument on that question with argument in *Village of Willowbrook*. *See* Sup. Ct. R. 27.3 (cited in Robert L. Stern et al., Supreme Court Practice § 14.6, at 580-81 (1993)).

The Court should also decide to consider the second question presented by this petition, which concerns the liability of municipalities for the decisions of a minority of members of a local commission allegedly motivated by personal animus. Specifically, the Connecticut Supreme Court held that the personal animus of two commission members established a municipal policy of the City of West Haven sufficient to impose liability under 42 U.S.C. § 1983, even though the commission's denial of respondents' zone change application was unanimous, and even though the allegedly tainted members recused themselves from the vote. The Connecticut Supreme Court thus entered an ongoing debate among federal and state courts regarding the meaning of this Court's holding that municipalities should be liable under § 1983 only for official actions taken pursuant to municipal "policy." *See Monell v. Dept. of Social Servs.*, 436 U.S. 658 (1978). The decision below, along with a similar holding by the Massachusetts Supreme Judicial Court, stands in sharp contrast to the Sixth, Ninth, and Eleventh Circuits' holdings that the impermissible motive of a single member does not render the actions of a council or commission – i.e., municipal policy – unconstitutional, and that a plaintiff must show bias on the part of *a majority* of council members in order to succeed in a claim against the municipality. *See Mt. Elliot Cemetery Ass'n v. City of Troy*, 171 F.3d 398 (6th Cir. 1999); *Church v. City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994); *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227 (9th Cir. 1994). Each of these decisions, in turn, differs from the approach adopted by the First Circuit, which holds that a plaintiff may impose liability on a municipality under § 1983 if he proves that a "significant bloc" of the members of a legislative body had an improper motive and circumstances suggest the "probable complicity of others." *See Scott-Harris v. Fall River*, 134 F.2d 427, 438 (1st Cir. 1997), *cert. denied*, 523 U.S. 1003

(1998). The existence of this clear and long-standing conflict within the federal system, and now between a federal circuit court and a state supreme court, is reason enough to grant the petition in order to resolve the conflict regarding the second question presented.

The importance to municipalities of resolving this conflict is obvious. The Court long ago rejected *respondeat superior* as a ground for municipal liability under § 1983, *see Monell*, 436 U.S. at 691, and has been careful to limit the liability of municipalities to matters over which a municipality can truly be said to have exercised control and responsibility. *See Pembauer v. City of Cincinnati*, 475 U.S. 469, 479 (1986). The Connecticut, Massachusetts, and First Circuit approaches run counter to the Court's rulings, by effectively placing the burden on municipalities to prove the constitutionality of commission decisions whenever a plaintiff can allege personal animus on the part of even one commission member, even a member who (like respondents here) recuses himself for the commission's vote. In *Monell*, the Court held that "[a] municipality cannot be held liable solely because it employs a tortfeasor." 436 U.S. at 691. Yet that is precisely the result of the Connecticut Supreme Court's decision. The Court should, therefore, also grant the petition to ensure that lower courts do not continue to undermine the Court's clear holdings under § 1983.

I. The Connecticut Court's Decision On The Scope Of The Equal Protection Clause And Municipal Liability Under Section 1983 Conflicts With Decisions Of Several Circuit Courts.

A. With its decision, the Connecticut Supreme Court has joined the First, Second, Seventh, Eighth, and Tenth Circuits, which have held that selective treatment of a single individual based solely on the personal

animus of a local or state official violates the Equal Protection Clause.[6] By contrast, the Sixth Circuit in *Futernick v. Sumpter Township*, 78 F.3d 1051 (6th Cir.), *cert. denied*, 519 U.S. 928 (1996), expressly rejected this line of federal court decisions and the approach now adopted by the Connecticut Supreme Court.

This long-standing federal circuit court split, which has now also become a split between a state supreme court and the Sixth Circuit, requires resolution by this Court, as the Court recognized when it granted the petition for a writ of certiorari in *Village of Willowbrook*. However, while a complete direct rejection of the *Esmail* and *LeClair* line of cases in *Village of Willowbrook* would of necessity decide this case in petitioners' favor, a decision by the Court to permit equal protection claims based upon personal animus would not necessarily resolve this case in view of the adequate state law remedies that were available to the respondents in this case (*see infra* Section II.A.1 at 20-22), and also in view of the second question presented.

B. This Court has long been concerned that plaintiffs could use 42 U.S.C. § 1983 to subject municipalities to liability for civil rights violations far beyond the intentions of the framers of the Civil Rights Act. Accordingly, the Court has strongly rejected *respondeat superior* as a basis for municipal liability under § 1983, requiring more

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[6] *See, e.g., Rubinovitz v. Rogato*, 60 F.3d 906, 911 (1st Cir. 1995); *Yerardi's Moody St. Restaurant & Lounge v. Bd. of Selectmen*, 878 F.2d 16, 21 (1st Cir. 1989); *LeClair v. Saunders*, 627 F.2d 606 (2d Cir. 1980); *Crowly v. Courville*, 76 F.3d 47, 52-53 (2d Cir. 1996) (applying *LeClair* standard); *La Trieste Restaurant & Cabaret Inc. v. Village of Port Chester*, 40 F.3d 587, 590 (2d Cir. 1994) (same); *Olech v. Village of Willowbrook*, 160 F.3d 386 (7th Cir. 1998), *cert. granted*, 67 U.S.L.W. 3528 (U.S. Sept. 28, 1999) (No. 98-1288); *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995); *Batra v. Bd. of Regents of University of Nebraska*, 79 F.3d 717, (8th Cir. 1996); *Smith v. Eastern New Mexico Medical Center*, 72 F.3d 138 (10th Cir. 1995) (unpublished decision).

than a municipality's mere employment of a tortfeasor to implicate municipal responsibility for civil rights deprivations. *See Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978). Rather, "the touchstone of the § 1983 action against a governmental body is an allegation that *official policy* is responsible for a deprivation of rights protected by the Constitution." *Id.* at 690 (emphasis added).

The second question presented asks the Court to intervene and resolve conflicting lower court decisions in cases in which a municipality's "final policymaker"[7] is a multi-member legislative or administrative body, particularly where plaintiffs can show impermissible motives only on the part of a minority of its members, an issue that the Court has not yet directly addressed. In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), the Court held that bias on the part of a member casting a deciding vote sufficed to violate due process, but it explicitly reserved the question of minority bias when the minority did not represent the deciding votes. *See id.* at 827 n.4. That reservation has not gone unnoticed in the lower courts, *see Stivers v. Pierce*, 71 F.3d 732, 746-48 & n.7 (9th Cir. 1995) (holding that an allegation of bias on the part of a single member of a board makes out a due process violation, at least in the context of a suit against an individual board member, but distinguishing a suit against a municipality), and the decision of those courts that have addressed such cases reflect no less than four conflicting approaches to the question of municipal liability.

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[7] In *Pembauer v. Cincinnati*, 475 U.S. 469 (1986), a plurality of the Court held that a municipal "policy," for the purposes of establishing municipal liability under 42 U.S.C. § 1983, can consist of a single act on the part of municipal officials, but the plurality was careful to limit such liability to situations in which the "decisionmaker possesses *final authority* to establish municipal policy with respect to the action ordered" and has made "a deliberate choice to follow a course of action . . . from among various alternatives." *Id.* at 481, 483 (plurality opinion) (emphasis added).

1. The first approach, which petitioners submit respects the Court's decisions rejecting *respondeat superior* under § 1983, is reflected in the Eleventh Circuit's holding in *Church v. City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994). There, a group of homeless persons challenged the city counsel's enforcement of certain building codes and zoning ordinances based on the "anti-homeless person" statements of a single city councilman, whom the trial court described as a "principal policymaker on homeless issues." *Id.* at 1343. The court of appeals declined to impose § 1983 liability on the municipality on such a basis:

> The imposition of municipal liability requires a decision by a final policymaker, not a "principal" one. In any event, the record in this case contains no evidence that [the single city councilman] is either the City's principal policymaker or its final policymaker with respect to the homeless. The plaintiffs concede that, under Alabama law, final policymaking authority rests with the entire five-member City Council and the Mayor. . . . The plaintiffs may not prevail on the basis of the actions or words of a single council member.

Id.[8] The Sixth Circuit recently agreed in *Mt. Elliot Cemetery Ass'n v. City of Troy*, 171 F.3d 398 (6th Cir. 1999), where it rejected an equal protection claim against a city for the city council's allegedly discriminatory rejection of a Catholic church's application for rezoning. There, the

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[8] The court of appeals recognized an exception to its holding in cases where the governing body had delegated final policymaking authority to the particular individual with the allegedly improper motive. *See Church*, 30 F.3d at 1343 (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988)). That exception is inapposite here, since Lewis and Saldibar recused themselves from voting on respondents' application.

court held that even the mayor's purportedly anti-Catholic remarks did not show that the council had been motivated by discrimination, where the mayor was but one of six council members who voted against the proposal. *Id.* at 406. The Ninth Circuit similarly held in *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227 (9th Cir. 1994), that one city council member's racially-motivated comments did not make the city liable to plaintiffs under § 1983 for its land use plan, where "the council adopted the plan unanimously and there [was] no evidence that any other council member acted with discriminatory intent or that the council as a whole took the action with discriminatory intent." *Id.* at 1239.[9]

2. The Connecticut Supreme Court's decision reflects the second of the four conflicting approaches to municipal liability. Under this second approach, a municipality must defend itself against a § 1983 lawsuit whenever a plaintiff alleges that even just one member of a municipal body before whom he appeared possessed some impermissible motive. In short, the municipality faces liability merely because a municipal official who lacked final policymaking authority acted improperly, a

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[9] Other lower courts have reached similar holdings, particularly in *Arroyo Vista Partners v. County of Santa Barbara*, 732 F.Supp. 1046 (C.D. Cal. 1990). In *Arroyo*, a zoning case on all fours with this case, the district court rejected an equal protection claim against a municipality based on the allegedly retaliatory motive of one commissioner in acting adversely to the plaintiff. As the court properly held, by merely voting on the same side as the wrongdoer, the other commissioners had not delegated the commission's policymaking authority so as to impose liability on the municipality under § 1983. *See id.* at 1056 (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 130 (1988)); *see also Holt Cargo Sys. v. Delaware River Port Auth.*, 20 F.Supp.2d 803 (E.D. Pa. 1998) (holding that, to impute individual substantive due process and equal protection violations to a municipal port authority, plaintiff must establish impermissible motives on the part of a majority of the authority's board).

holding directly contrary to *Monell*'s rejection of *respondeat superior*. The Massachusetts Supreme Judicial Court takes a similar approach to municipal liability under § 1983. In *Southern Worcester County Regional Vocational School District Commission*, 436 N.E.2d 380 (Mass. 1982), that court held that discharged teachers established a claim against a school board despite only being able to show unlawful anti-union bias on the part of three board members. *See id.* at 419 n.6.

3. The First Circuit has noted the split of authority on this issue and adopted a third, intermediate approach that differs from that of both the Connecticut Supreme Court and the Sixth, Ninth, and Eleventh Circuits. *See Scott-Harris v. City of Fall River*, 134 F.3d 427, 438 (1st Cir. 1997), *cert. denied*, 523 U.S. 1003 (1998). In *Scott-Harris*, the court posed the second question presented by this petition as follows:

> How many municipal legislators (or, put another way, what percentage of the legislative body) must be spurred by a constitutionally impermissible motive before the municipality itself may be held liable under section 1983 for the adoption of a facially neutral policy or ordinance?

The court held that a plaintiff could impose liability on a municipality under § 1983 even though he could not show "bad motive on the part of a majority of the members of a legislative body," so long as the plaintiff showed (1) bad motive on the part of "at least a significant bloc of legislators," and (2) "circumstances suggesting the probable complicity of others." *Id.*[10]

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[10] Other federal courts of appeal have found that a minority of unconstitutionally-motivated commissioners or legislators can violate a plaintiff's civil rights, though they have not addressed the question of extending that liability to the municipality itself. *See, e.g., Stivers v. Pierce*, 71 F.3d 732 (9th Cir.

4. Finally, the Second Circuit has taken a fourth and markedly different approach, invoking the mixed-motives burden-shifting framework adopted by this Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). In *Mt. Healthy*, this Court held that once a teacher had established that his constitutionally protected First Amendment conduct was a "substantial factor" in the board of education's decision not to rehire him, the burden would shift to the board to prove that it would not have rehired the teacher even if it only based its decision on constitutionally permissible reasons. *Id.* at 287. The Second Circuit has taken *Mt. Healthy* one step further, however, and treated a facially legitimate city council decision supported by a tainted minority as a "mixed-motives" case,[11] in which the municipality must bear the burden of overcoming a prima facie case of a constitutional violation. *See Coogan v. Smyers*, 134 F.3d 479, 485 (2d Cir. 1998); *see also Yerardi's Moody Street Restaurant & Lounge v. Bd. of Selectmen*, 932 F.2d 89, 91 n.2 (1st Cir. 1991) (noting appeal of *Mt. Healthy* approach in cases involving decisions by boards with a minority of members tainted by impermissible motives).

There is no prospect that this widespread conflict regarding this question will be resolved absent a decision by this Court. As the First Circuit noted in *Scott-Harris*, the case law in this area is "uncertain" – "a fickle companion." 134 F.3d at 437, 438. At present, municipalities' exposure to liability under § 1983 will be shaped to no small degree by the circuit in which they are located. Petitioners respectfully urge the Court to take this opportunity to resolve this important conflict, independent of

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1995); *Hicks v. City of Watonga*, 942 F.2d 737 (10th Cir. 1991); *Wilkerson v. Johnson*, 699 F.2d 325 (6th Cir. 1983).

[11] By contrast, the official decision of the board in *Mt. Healthy* expressly identified the petitioner's protected First Amendment conduct as one of the reasons for its decision not to rehire him. *Mt. Healthy*, 429 U.S. at 274.

the outcome of the equal protection issue in *Village of Willowbrook*.

II. The Decision Of The Connecticut Supreme Court Is Erroneous.

A. The Connecticut Supreme Court first erred by adopting a standard, set forth in *LeClair*, *Esmail*, and *Village of Willowbrook*, that recognizes equal protection violations based upon selective treatment motivated solely by personal animus. As the Sixth Circuit recognized in *Futernick v. Sumpter*, however, the Equal Protection Clause of the Fourteenth Amendment protects individuals against selective treatment by the government because of their membership in suspect classes. In other words, the Equal Protection Clause is concerned with discrimination against *groups*. *See Personnel Admin. of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (holding "discriminatory purpose" to "impl[y] that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group"); Skelly Wright, *Judicial Review and the Equal Protection Clause*, 15 Harv. C.R.-C.L. L. Rev. 1, 27 (1980) ("The . . . equal protection clause is primarily concerned with classes or groups, not individuals. As I am confident Mr. Justice Frankfurter must have written somewhere, a case involving the equal protection clause, if it is to succeed, must allege something more than a tort, personal to the plaintiff."); Owen Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107, 147-56 (1976). This interpretation of the Equal Protection Clause finds its roots in the intent of the framers of the Fourteenth Amendment, whose overriding goal was to protect recently emancipated slaves from discriminatory laws and treatment by the States on the basis of their race. *See, e.g., Palmer v. Thompson*, 403 U.S. 217, 220 (1971); *Strauder v. West Virginia*, 100 U.S. 303, 306-07 (1879).

To be sure, the Court has not limited the protections afforded by the Equal Protection Clause strictly to race-based classifications. However, the Court has consistently interpreted the clause to prohibit unjustifiable legislative *classifications* – that is, irrational or arbitrary distinctions between people based upon *group* characteristics. The Court has adhered to that interpretation even as it has extended the scope of the Equal Protection Clause into the selective enforcement arena. *See, e.g., Oyler v. Boles*, 368 U.S. 448, 456 (1962) (selective enforcement violates equal protection only when "based upon an unjustifiable standard such as race, religion, or other arbitrary *classification*") (emphasis added); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Indeed, in the one case in which an individual alleged that state officials discriminated *against him personally* – by refusing "willfully, maliciously and arbitrarily" to list his name on a ballot for state office, even though he had won sufficient votes in a primary to qualify for listing – the Court rejected the individual's equal protection claim. *See Snowden v. Hughes*, 321 U.S. 1 (1944). Thus, this Court's precedents do not support the "class of one" approach to the Equal Protection Clause espoused in *LeClair*, *Esmail*, and in the Connecticut Supreme Court's decision in this case.

Not surprisingly, therefore, courts in cases such as *LeClair* and *Esmail* have candidly recognized that they are treading on shaky constitutional ground by expanding the scope of the Equal Protection Clause to protect individuals against selective treatment motivated solely by personal animus – that is to say, against selective treatment of a "class of one," unrelated to suspect groups or the exercise of fundamental constitutional rights. *See Esmail*, 53 F.3d at 180 ("It is true that the abuse charged in this case is remote from the concern of the framers of the equal protection clause."); *LeClair*, 627 F.2d at 608 ("This case is lodged in a murky corner of equal protection law in which there are surprisingly few cases and no clearly delineated rules to apply."). The Sixth Circuit had it exactly right when it recognized that

> personal animosity should not turn an otherwise valid enforcement action into a violation of the Constitution. From a constitutional perspective, personal animosity not related to group identity or the exercise of protected rights is as random as the roll of a dice. . . . [T]he Constitution's protection begins only when the *incidence* of the burden of regulation becomes constitutionally suspicious.

Futernick, 78 F.3d at 1059.

Beyond the original intent of the Equal Protection Clause and the Court's decisions under it, there are additional reasons that the "sundry motivations of local regulators should *not* be policed by the Equal Protection Clause of the United States Constitution, absent the intent to harm a protected group or punish the exercise of a fundamental right." *Id.* at 1058.

1. First, state laws already provide more than adequate remedies for injuries suffered as a result of the personal animus of local or state officials. *Id.* at 1059 ("Regulation out of personal dislike or vendetta is repugnant to the American tradition of the rule of law. The states themselves are vibrant defenders of this tradition."). Indeed, this case illustrates well the efficacy of such remedies. Under Connecticut law, as in most, if not all, states across the country, individuals disappointed by an adverse decision of their local zoning commission have a statutory right to appeal the decision of the commission on the ground that it is arbitrary, illegal, or otherwise unjustified. *See* Pet. App. 87. In fact, as both courts below that reversed the commission's rejection of respondents' request recognized, "hostility . . . [or] personal bias or prejudice that imperils the open-mindedness and sense of fairness which a zoning official in our state is required to possess" is a ground in Connecticut for reversing the zoning board's action. Pet. App. 72. Respondents successfully exercised that state statutory right twice, each time obtaining a right to a rehearing on their zone change application.

Notably, if the decision below stands, individuals such as respondents can side-step the state administrative appeal process entirely. Based on the Connecticut Supreme Court's decision, after the initial denial of their zone change application, respondents could simply have filed a § 1983 action in federal court alleging an equal protection claim, for unlike the state administrative process, exhaustion is generally not required under § 1983. *See, e.g., Patsy v. Bd. of Regents of the State of Florida*, 457 U.S. 496 (1982). Recognizing an equal protection claim in these circumstances would therefore undermine the legal remedies and requirements that the state has created to deal precisely with the type of allegations raised in this case.

Similarly, recognizing a right to bring an equal protection claim *after* state remedies have successfully been utilized to overturn the adverse decision complained of – as respondents did in this case – would trivialize the Equal Protection Clause, reducing it to little more than a costs-and-attorneys'-fees provision. That is so because where, as here, a plaintiff does not have a legitimate claim of entitlement to the benefit he is seeking, it would be inappropriate for a court that finds an equal protection violation based on personal animus to direct the local official or commission to grant the substantive benefit at issue, such as a zone change. Rather, it could only direct the local official or commission to reconsider the plaintiff's request, free of the taint of personal animus. *See supra*, n. 3. That is precisely the remedy that the state courts provided in this case. Beyond that relief, a court finding an equal protection violation could only award the plaintiff the costs and attorneys' fees incurred as a result of the reconsideration process.[12] In fashioning its

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[12] *Esmail* is a prime example of a case in which the equal protection clause was reduced to nothing more than an attorneys'-fees provision. The plaintiff in *Esmail* was a liquor dealer who held a city liquor license that was renewable

state administrative procedure, however, Connecticut has not chosen to give attorneys fees to those applicants that are successful in overturning a zoning board decision. *See* Pet. App. 91. Once again, therefore, recognizing an equal protection claim in these circumstances undermines the state's carefully crafted administrative law.

2. The second reason for rejecting personal animus as grounds for an equal protection claim is that another provision of the Fourteenth Amendment – the Due Process Clause – already provides adequate federal constitutional protection in the cases that warrant such protection. The Court recently reaffirmed that "the touchstone of due process is protection of the individual against arbitrary action of government." *County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998) (citing *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). However, this *substantive* constitutional protection against arbitrary government action extends only to the most "egregious official conduct," *i.e.*, conduct that "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." *Id.* at 846-47 (citing *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992)). The Court's requirement that a plaintiff must establish that the official

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annually. In 1992, however, the city refused to renew the license, allegedly on the basis of certain legal infractions that the plaintiff had committed. The plaintiff alleged that the liquor licenses of other individuals with similar or worse infractions had routinely been renewed and that his license was not renewed because of the personal animus of the local mayor. The plaintiff, however, successfully sued in state court and obtained the license renewal by court order. After obtaining the license, the plaintiff then brought suit in federal court complaining that the mayor had engaged in a "campaign of vengeance" in violation of his right to equal protection. As damages, he sought the $75,000 in legal fees expended in the state courts to obtain his license renewal. The court of appeals held that his allegations stated a claim under the Equal Protection Clause. *Esmail*, 53 F.3d at 180.

action complained of was so egregious as to "shock the conscience" ensures that the Fourteenth Amendment does not become a "font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.* at 848 (citing *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

In holding that personal animus can support an equal protection claim, the Connecticut court dramatically lowered the standard for proving that arbitrary government action is unconstitutional in at least two ways. First, a plaintiff who has *not* been deprived of a constitutionally protected liberty or property interest, such as respondents in this case, can now complain that he was nevertheless "injured" by arbitrary government action simply by characterizing the challenged action as "selective treatment." Second, instead of having to prove that the challenged government action was so egregious as to "shock the conscience," a plaintiff need prove only that the government action was motivated by bad faith or personal animus. As the *Futernick* court recognized, such a holding does exactly what the Court sought to avoid in *Lewis*. It turns the Constitution into a "font of tort law that is superimposed" on the state's system. *See Futernick*, 78 F.3d at 1058 (rejecting *LeClair*'s approach of "federaliz[ing] and constitutionaliz[ing] what are essentially issues of local concern").

In addition to undermining the Court's substantive due process jurisprudence, the Connecticut Supreme Court's decision also threatens the Court's procedural due process precedents. For example, the Court has held that in circumstances where the state cannot anticipate the deprivation of a liberty or property interest, and thus cannot provide appropriate pre-deprivation process, even intentional deprivations of an individual's property by a public official do not give rise to a procedural due process claim so long as adequate post-deprivation remedies are available *under state law*. *See, e.g., Hudson v. Palmer*, 468 U.S. 517 (1984) (intentional destruction of inmate's personal property by prison guard); *Parratt v. Taylor*, 451

U.S. 527 (1981); *Ingraham v. Wright*, 430 U.S. 651 (1977) (corporal punishment of student by public school teacher); *Paul v. Davis*, 424 U.S. 693 (1976). "For intentional, as for negligent deprivations of property by state employees, *the state's action is not complete* until and unless it provides or refuses to provide a suitable post-deprivation remedy." *Hudson*, 468 U.S. at 533 (emphasis added).

As a consequence, even if the zoning commission's action had deprived respondents of a property interest, a procedural due process claim would fail because Connecticut *does* provide a meaningful post-deprivation remedy, as respondents' two successful administrative appeals demonstrate. As previously noted, however, respondents did *not* have a legitimate claim of entitlement to the requested zone change. Therefore, the commission's decision did not deprive them of property in violation of the Due Process Clause. *See* Pet. App. 65. Allowing respondents to pursue their claim under the rubric of the Equal Protection Clause, therefore, puts them in a better position, in terms of securing a constitutional remedy, than one who *was* deprived of property. That is a bizarre and anomalous result that finds no justification in the federal constitution, the Court's precedents, or common sense.

In short, the Due Process Clause is the provision of the Fourteenth Amendment that prohibits arbitrary government action against individuals *qua individuals*, and the Equal Protection Clause is the provision that prohibits arbitrary government action against individuals *as members of groups*. The Court should therefore grant this petition and decide that a plaintiff does not state a claim under the Equal Protection Clause simply by alleging that he was treated selectively because of personal animus. However, if the Court decides to recognize an equal protection claim under such circumstances, at a bare minimum it should reject the approach of the Connecticut Supreme Court and restrict the circumstances in which this newly expanded claim can be asserted so that it does

not do violence to the Court's substantive and procedural due process jurisprudence.

B. The Connecticut Supreme Court's second fundamental error was its conclusion that respondents had been selectively treated compared to other similarly situated zone change applicants. The court appeared to state that the imposition of a site plan requirement at the first hearing on respondents' zone change application constituted selective treatment. *See* Pet. App. 22-27. However, no such requirement was imposed at the second hearing. The only issue at the second hearing (at which both Saldibar and Lewis recused themselves) was whether the alleged personal animus of Lewis and Saldibar tainted the vote of the zoning commission. The Supreme Court held that evidence of that animus, coupled with its possible impact on the full commission's vote on respondents' application, was itself sufficient to support an equal protection claim.

The flaws in this reasoning are twofold. First, the court improperly collapsed the two prongs of the *LeClair* standard – (i) selective treatment *and* (ii) malice or bad faith intent to injure – into a single prong – personal animus. In other words, the court effectively held that any time a local official exercises his discretion based on personal animus, the decision is necessarily a form of selective treatment because, by definition, others for whom the official does not harbor personal animus, were treated differently because they were afforded a good faith, honest consideration of their request.

Second, even if the court's single-prong analysis were permissible, it follows that if personal animus is itself a form of selective treatment, then removing the official with personal animus from the decision-making process should eliminate any claim of constitutionally impermissible selectivity, absent bribery, threats, or the like by the recused official, which was not even alleged here. That, of course, is precisely the purpose of section 8-11 of the Connecticut General Statutes, which requires zoning

commission members to disqualify themselves from participating in any hearing in which they have a personal interest. *See* Pet. App. 93. And, as set forth above, Connecticut decisional law defines "personal interest" to include hostility towards an opposing party which impairs a commission member's open-mindedness. *See* Pet. App. 72.

Consequently, an individual appearing before a municipal commission would not be denied the equal protection of the laws as long as any member of the commission with a personal interest recused himself – *just as respondents did here.* To hold, as the Connecticut Supreme Court did, that the personal animus of a zoning commission member can be imputed to the full commission even when the member recuses himself reduces section 8-11, and other states' disqualification laws, to meaningless verbiage. While the state courts are free to interpret state statutes to provide enhanced substantive protection against potentially unfair hearings, the Equal Protection Clause at most requires only what Lewis and Saldibar did here – recuse themselves from voting on respondents' zone change application.

C. The Connecticut Supreme Court's third, and related, fundamental error was conflating the actions of two individuals – Saldibar and Lewis – with the decision of the full zoning commission, which petitioners have conceded is the final policymaking authority over West Haven zoning matters. *See* Pet. App. 32. That holding effectively resurrects *respondeat superior* as a basis for municipal liability, a basis that the Court rejected long ago and replaced with the requirement that a plaintiff demonstrate that official "policy" led to an alleged deprivation of civil rights. *See Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978). As a plurality of the Court held in *Pembauer*, individual actions by municipal officials rise to the level of policy only "where the decisionmaker possesses final authority to establish municipal policy *with respect to the action ordered.*" 475 U.S. at 483 (emphasis added). Furthermore, the identification of a

municipality's final policymakers is a matter of law, to be determined before the factfinder reaches the question of whether their actions caused the deprivation of a plaintiff's civil rights. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)

The Connecticut Supreme Court has fundamentally misconstrued this doctrine by equating two distinctly different matters: 1) the actions of two recused members of the zoning commission; and 2) the full commission's unanimous decision rejecting respondents' zone change application. Section 1983 does not impose liability on municipalities for every constitutional tort committed by municipal officials. Liability is reserved only for those violations "for which the municipality itself is actually responsible." *Pembauer*, 475 U.S. at 480 (majority holding). Yet by imposing liability on the City of West Haven because of the animus of only two members of the zoning commission, who recused themselves from voting on respondents' application, the Connecticut Supreme Court has effectively reincorporated the doctrine of *respondeat superior* into § 1983.

As noted above, other courts have acknowledged and affirmed the critical distinction between a final policymaking body and its members as individual officials. Thus, in *Church*, the Eleventh Circuit refused to impose municipal liability under § 1983 where a group of homeless persons alleged selective treatment by the city counsel, but only challenged the illegitimate bias of a single city councilman. The court held that the "final" policymaker for purposes of municipal liability was the council *as a whole*, and that the plaintiffs could not prevail based on the actions or words *of any one member*. 30 F.3d at 1343. The Ninth Circuit agreed in *Kawaoka*, rejecting municipal liability for the motives a single city councilman where a final policymaking decision could only be made by majority vote. *See* 17 F.3d at 1239. The Sixth Circuit has even made clear that a municipal official as high-ranking as the mayor is not a "final" policymaker under *Pembauer*

where decisions are made by the majority of a decision-making body. *See Mt. Elliot Cemetery Ass'n*, 171 F.3d at 406. And in *Arroyo Vista Partners v. County of Santa Barbara*, 732 F.Supp. 1046 (C.D. Cal. 1990), the district court held that a single zoning commissioner's allegedly retaliatory motive was insufficient to state a claim against the commission itself, and thus the municipality, under § 1983.[13] *See id.* at 1055-56.

The Connecticut Supreme Court's approach – echoed by the Massachusetts Supreme Judicial Court in *Southern Worcester County* – sets the bar far too low for plaintiffs seeking relief from municipalities under § 1983. So too does the "relaxed" approach of the First Circuit, which requires a plaintiff only to show that a "significant bloc" of a legislative body's members had an improper motive," along with "circumstances *suggesting* the probable complicity of others." *See Scott-Harris*, 134 F.3d at 437 (emphasis added). The First Circuit itself acknowledged that peering into a legislative body's motives was a "delicate business." *Id.* at 436. Because judicial inquiry into legislators' motives is a hazardous endeavor, at best, *see United States v. O'Brien*, 391 U.S. 367, 383-84 (1968), municipalities may well face liability under the First Circuit's standard in a significant number of § 1983 claims for which they would not otherwise be liable. Municipalities will thus be inviting targets for plaintiffs seeking recovery for alleged constitutional wrongs by members of city councils, school boards, or zoning commissions, to name but a few examples. This is exactly the prospect

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[13] In *Arroyo*, a local board of supervisors denied a real estate development partnership's application for a final development plan for a large housing development. The partnership asserted claims for denial of procedural and substantive due process and equal protection, alleging that a member of the board had voted to deny the application in retaliation for the partnership's support of the member's opponent in a recent election.

that the Court sought to avoid in rejecting *respondeat superior* under § 1983.[14]

Finally, the Connecticut court's conclusion that Saldibar and Lewis could be viewed as the "moving force" behind the zoning commission's decision pays mere lip service to the fact that they recused themselves from voting at the second hearing on respondents' application, which nonetheless resulted in another unanimous rejection of their zone change request. If the Connecticut Supreme Court's reasoning is correct, no municipal body containing a minority of outspoken, potentially biased members could ever protect itself against a personal animus-based equal protection claim. Such a holding goes even further beyond *respondeat superior* to hold municipalities liable for actions they could not control under any circumstances.

III. The Questions Presented Are Important

As previously noted, by granting the petition for certiorari in *Village of Willowbrook*, the Court has already recognized the importance of the Equal Protection Clause issue in the first question presented. However, the Connecticut court's decision on the scope of municipal liability, which is the subject matter of the second question presented, also raises issues of profound importance for the thousands of municipalities across the country. As this case illustrates, decisions regarding the dispensation of municipal benefits and services are often made, not by an individual official, but by a collective body. If the improper motive of a single member of such a body is

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[14] The Second Circuit's mixed-motives approach adopted in *Coogan v. Smyers* also does not adequately safeguard municipalities from *respondeat superior* liability under § 1983. *See* 134 F.3d at 485. The Second Circuit's approach imputes the improper motive of a minority of members to other members of a board whose overall good faith should be presumed. *See, e.g., Hicks*, 942 F.2d at 746.

sufficient to taint that action of a body as a whole, *even when the member recuses himself from voting on the matter in issue,* municipalities will have lost all ability to protect themselves against potentially ruinous lawsuits.

In sum, the authorities reflect a fundamental disagreement on how the questions presented by this petition should be resolved. To bring certainty to these issues of importance to all municipalities and states nationwide, and to protect the Court's carefully considered Due Process Clause jurisprudence from evisceration, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 27, 1999

**Counsel of Record*

App. 1

George **THOMAS** et al.

v.

CITY OF **WEST HAVEN** et al.

No. 15843.

Supreme Court of Connecticut.

Argued March 24, 1999.

Decided June 29, 1999.

John A. Reed, with whom were Wesley W. Horton, Hartford, and, on the brief, William C. Turney and Paul Croce, legal intern, for appellants (plaintiffs).

Joseph L. Rini, New Haven, with whom was Michael P. Farrell, West Haven, for the appellees (named defendant et al.)

Before CALLAHAN, C.J., and BORDEN, BERDON, NORCOTT and PALMER, JJ.

BORDEN, J.

The dispositive issue in this appeal[1] involves the evidentiary showing necessary to establish a prima facie case of federal equal protection violations against a city, its planning and zoning commission, and certain individual commissioners serving on the commission. The plaintiffs, George Thomas, Barbara Thomas and John Finnell, appeal from the judgment of the court, Hon. Frank S. Meadow, judge trial referee, in favor of the defendants,

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[1] The plaintiffs appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to Practice Book § 65-1 and General Statutes § 51-199(c).

the city of West Haven (city), the city's planning and zoning commission (commission), and two individual commissioners, Donald Lewis and David Saldibar. By that judgment, the trial court granted the defendants' motion to dismiss. The plaintiffs claim that the trial court improperly dismissed their action because they had established a prima facie case that: (1) Lewis and Saldibar had treated them maliciously and selectively in the consideration of their zone change application; and (2) a municipal policy of the city caused the plaintiffs to be deprived of their constitutional rights. We agree with both claims of the plaintiffs and, therefore, we reverse the judgment of the trial court.

Certain facts and the procedural history are undisputed. In April, 1986, the plaintiffs filed an application with the commission requesting a change in the zoning of two parcels of land that they owned at 770 Campbell Avenue, West Haven.[2] The plaintiffs sought to change the zoning of both parcels from the existing C-2 (commercial local service) and R3-2 (residential two family) to R-5 (residential apartment building),[3] which would allow them to develop condominiums on the property. After a public hearing on May 13, 1986, the commission denied the application with prejudice on May 20, 1986. Saldibar was the chairman and Lewis was the vice chairman of the

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[2] The named plaintiff, George Thomas, filed the application on behalf of all of the plaintiffs.

[3] In 1980, when the plaintiffs acquired their interest in the property, it consisted of two separately zoned parcels, C-2 and R3-2. The 1986 request was to change the zoning of both parcels to R-5.

commission during these proceedings. The plaintiffs appealed from the May 20, 1986 decision[4] to the Superior Court pursuant to General Statutes (Rev. to 1985) § 8-8.[5] In January, 1987, following a trial, the court, Schimelman, J., sustained the plaintiffs' appeal, finding that "[w]ith respect to the claim of predetermination due to the lack of a fair and impartial hearing . . . [the] plaintiff[s] [had] sustained [their] burden of proof as evidenced by the record." The plaintiffs subsequently requested a rehearing before the commission on their zone change application, which took place on June 23, 1987. The plaintiffs' application again was denied, and the plaintiffs appealed this decision to the Superior Court. In June, 1988, the court, Flanagan, J., sustained the appeal, finding that

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[4] This appeal also included a challenge to the denial by the commission of a zone change request made by the plaintiffs, in the name of T.F. Builders, on June 16, 1986. This request, which was to change the zoning of the parcels from C-2 and R3-2 to CM (mixed commercial/residential), was denied after a public hearing on July 14, 1986. The denial of this zone change request is not at issue in this appeal.

[5] General Statutes (Rev. to 1985) § 8-8(a) provides: "Any person or persons severally or jointly aggrieved by any decision of said board, or any person owning land which abuts or is within a radius of one hundred feet of any portion of the land involved in any decision of said board, or any officer, department, board or bureau of any municipality, charged with the enforcement of any order, requirement or decision of said board, may, within fifteen days from the date when notice of such decision was published in a newspaper pursuant to the provisions of section 8-3 or 8-7, as the case may be, take an appeal to the superior court for the judicial district in which such municipality is located, which appeal shall be made returnable to said court in the same manner as that prescribed for civil actions brought to said court."

"[t]he atmosphere created by the foregoing was one of hostility in which the applicant was unable to obtain the fair and reasonable hearing to which he was entitled."

The plaintiffs then commenced the present action, alleging that the defendants[6] unconstitutionally: (1) had taken their property in violation of the plaintiffs' rights to due process under both the state and federal constitutions; and (2) had denied them their rights, under both the federal and state constitutions, to due process of law and equal protection of the law.[7] The plaintiffs sought redress for their federal claims under 42 U.S.C. § 1983.[8] In August, 1995, on competing motions for summary judgment by the plaintiffs, the city and the commission, the court, Gordon, J., granted summary judgment in favor of

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[6] In their original complaint, the plaintiffs had named as defendants the mayor of the city, Azelio M. Guerra, as well as several other commissioners, namely, Donald Voss, Steven Prindle, Francis Withington, Allen Alderman and Joseph Celentano. Subsequently, the complaint was withdrawn as to these commissioners, and the appeal to this court was withdrawn with regard to Guerra.

[7] The plaintiffs' original complaint in the present action, filed in May, 1989, alleged due process and taking violations only. The plaintiffs subsequently amended the complaint to add allegations of equal protection violations.

[8] Title 42 of the United States Code, § 1983, provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . "

the defendants on the federal due process claims. On June 5, 1996, the commissioners filed a combined motion to dismiss, motion to strike, motion for permission to file summary judgment, and motion for summary judgment. On July 24, 1996, the court, Booth, J., denied the motion to dismiss and the motion for permission to file summary judgment, but granted the motion to strike the state due process claim.[9]

The case proceeded to trial on the remaining counts before the court, Meadow, J. After the plaintiffs had completed their case-in-chief, the defendants moved for judgment of dismissal for failure to make out a prima facie case pursuant to Practice Book § 302, now § 15-8.[10] The court granted the defendants' motion to dismiss and this appeal followed.[11]

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[9] The plaintiffs have not pursued on appeal either the federal or state due process claims that the courts, Gordon, J., and Booth, J., respectively, rejected prior to trial. After the presentation of the plaintiffs' evidence, the court, Meadow, J., rejected their taking claim. The plaintiffs do not pursue that claim on appeal. Thus, this appeal involves only their federal equal protection claim.

[10] Practice Book § 15-8 provides in relevant part: "If, on the trial of any issue of fact in a civil action tried to the court, the plaintiff has produced evidence and rested his or her cause, the defendant may move for judgment of dismissal, and the judicial authority may grant such motion, if in its opinion the plaintiff has failed to make out a prima facie case. . . ."

[11] Saldibar and Lewis filed a cross appeal raising fifteen preliminary issues. The Appellate Court granted the plaintiffs' motion to dismiss the cross appeal and ordered, sua sponte, that the defendants' preliminary statement of issues be treated as a request, pursuant to Practice Book § 4013, now § 63-4(a)(1)(B), for appellate review of adverse rulings of the trial court should

I

The plaintiffs first claim that the trial court improperly dismissed their case because they had "established a prima facie case that . . . Lewis and Saldibar treated the plaintiffs selectively compared with others similarly situated based on a malicious or bad faith intent to injure in violation of [their rights to] equal protection." We agree.

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the plaintiffs prevail on this appeal. Several of these claims may be viewed as, in effect, alternate grounds for affirmance of the trial court's judgment. We decline to consider these issues for several reasons.

First, "[t]he appellee's right to file a § 63-4(a)(1) statement has not eliminated the duty to have raised the issue in the trial court"; W. Horton & S. Cormier, Rules of Appellate Procedure (1998 Ed.) § 63-4, authors' comments, p. 120; *see Peck v. Jacquemin*, 196 Conn. 53, 61-62 n. 13, 491 A.2d 1043 (1985). A review of the transcript of the proceeding before the trial court and the memorandum of law submitted in support of the motion to dismiss, indicates that several of the issues listed in the defendants' preliminary statement of issues – for example, the claim that summary judgment should have been rendered in their favor based on qualified immunity – were never presented to the trial court.

Moreover, "issues raised in the defendant's preliminary statement of issues which were not briefed are considered abandoned." *State v. Samaha*, 180 Conn. 565, 565 n. 1, 430 A.2d 1290 (1980). The claim that the plaintiffs must establish an entitlement to a zoning change as a predicate to their equal protection challenge has not been briefed, nor has the claim that they are immune from suit under the doctrine of qualified immunity. Finally, we conclude that, in light of the procedural posture of this case, to the extent that any of the defendants' remaining alternate grounds for affirmance were raised properly and remain relevant and unaddressed following our disposition of this appeal, those claims will be resolved more properly in the context of a full trial.

"A motion for judgment of dismissal has replaced the former motion for nonsuit for failure to make out a prima facie case. . . . *[S]ee Lukas v. New Haven*, 184 Conn. 205, 210 n. 3, 439 A.2d 949 (1981). When such a motion has been granted, the question is whether sufficient facts were proved to make out a prima facie case. *Pignatario v. Meyers*, 100 Conn. 234, 239-40, 123 A. 263 (1924)." (Citations omitted; internal quotation marks omitted.) *Falker v. Samperi*, 190 Conn. 412, 418, 461 A.2d 681 (1983). "The right of the court to grant such a motion is to be sparingly exercised . . . where the granting of a nonsuit must depend in any appreciable degree upon the court's passing upon the credibility of witnesses, the nonsuit should not be granted; *Pentino v. Pappas*, 96 Conn. 230, 232, 113 A. 451 [1921]; where a case is close, the preferable course is to deny a motion for a nonsuit; *Bawol v. Gumkowski*, 104 Conn. 746, 133 A. 917 [1926]. *Crowell v. Palmer*, 134 Conn. 502, 505, 58 A.2d 729 (1948)." (Citations omitted; internal quotation marks omitted.) *Lukas v. New Haven, supra*, at 210-11, 439 A.2d 949.

"A prima facie case, in the sense in which that term is relevant to this case, is one sufficient to raise an issue to go to the trier of fact. 9 J. Wigmore, [Evidence (4th Ed.1974)] § 2494, p. 379. In order to establish a prima facie case, the proponent must submit evidence which, if credited, is sufficient to establish the fact or facts which it is adduced to prove. . . . *Berchtold v. Maggi*, 191 Conn. 266, 270, 464 A.2d 1 (1983); *see* C. Tait & J. LaPlante, [Connecticut Evidence (2d Ed.1988)] § 4.3, p. 72. In evaluating a motion to dismiss, [t]he evidence offered by the plaintiff is to be taken as true and interpreted in the light most

favorable to [the plaintiff], and every reasonable inference is to be drawn in [the plaintiff's] favor. . . . *Angelo Tomasso, Inc. v. Armor Construction & Paving, Inc.*, 187 Conn. 544, 548, 447 A.2d 406 (1982)." (Internal quotation marks omitted.) *New England Savings Bank v. Bedford Realty Corp.*, 246 Conn. 594, 608, 717 A.2d 713 (1998). "A party has the same right to submit a weak case as he has to submit a strong one. *Fritz v. Gaudet*, 101 Conn. 52, 53, 124 A. 841 (1924)." *Falker v. Samperi, supra*, 190 Conn. at 419, 461 A.2d 681.

Further, we have stated that "[t]he decisions of the federal circuit in which a state court is located are entitled to great weight in the interpretation of a federal statute. This is particularly true in 42 U.S.C. § 1983 cases, where the federal statute confers concurrent jurisdiction on the federal and state courts." (Internal quotation marks omitted.) *Red Maple Properties v. Zoning Commission*, 222 Conn. 730, 739 n. 7, 610 A.2d 1238 (1992). We therefore look to recent decisions of the Court of Appeals for the Second Circuit for guidance on the issues presented in the present case.

"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is essentially a direction that all persons similarly situated should be treated alike. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 [1982])." (Internal quotation marks omitted.) *Zahra v. Southold*, 48 F.3d 674, 683 (2d Cir.1995). "A violation of equal protection by selective [treatment] arises if: (1) the person, compared with others similarly situated, was selectively treated; and

(2) . . . such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person. *LaTrieste Restaurant & Cabaret Inc. v. Village of Port Chester,* 40 F.3d 587, 590 (2d Cir.1994) (quoting *LeClair v. Saunders,* 627 F.2d 606, 609-10 (2d Cir.1980), *cert. denied,* 450 U.S. 959, 101 S.Ct. 1418, 67 L.Ed.2d 383 [1981]).[12] [When a plaintiff] does not allege selective treatment based upon his race, religion, or any intentional effort by [the] defendants to punish him for exercising his constitutional rights, [the plaintiff] must demonstrate that [the] defendants maliciously singled [him] out . . . with the intent to injure him." (Internal quotation marks omitted.) *Crowley v. Courville,* 76 F.3d 47, 52-53 (2d Cir.1996).

Viewed in the light most favorable to the plaintiffs, the following evidence was before the court and is relevant to the determination of whether the plaintiffs had established a prima facie case of an equal protection violation by the defendants. In 1980, the plaintiffs[13] had

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[12] Although the cases cited in support of this standard each involved the alleged selective enforcement of a regulation or ordinance by the defendants against the plaintiffs, selective enforcement is merely a subcategory of selective treatment. The test laid out in *LeClair v. Saunders, supra,* 627 F.2d at 609-10, is equally applicable to the case at hand, in which the plaintiffs are alleging both that the defendants selectively: (1) enforced an alleged site plan requirement against them; and (2) treated the plaintiffs with an attitude of "disdain, animosity and palpable hostility" that was not exhibited toward other applicants.

[13] In 1980, the group of persons involved in this business venture were George Thomas, John Finnell and Pasquale Egidio. During 1984, prior to the filing of any of the applications at issue

plans to develop an amusement center offering arcade games, pinball and pool tables. For this purpose, the plaintiffs intended to lease the property located at 770 Campbell Avenue, which was, at that time, the site of a boarded up building with ample parking. The property consisted of two separately zoned parcels, R3-2[14] and C-2.[15] Operation as a pool hall was permissible on C-2 zoned property, but operation as a video arcade was considered an "accessory use."[16] Thus, the plaintiffs

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in this appeal, Egidio left the business partnership and relinquished his interest in the property. Barbara Thomas had acquired title to a portion of George Thomas' interest prior to Egidio's departure in 1984.

[14] A R3-2 district is a general residence district zoned for two families. "These districts are designed to provide types of residential buildings that will permit a broad range of housing types with appropriate standards for each district on density, open space, and spacing of buildings. The various districts are mapped in relation to a desirable future residential density pattern, with emphasis on accessibility to transportation facilities and to various community facilities, and upon the character of existing facilities and open uses which serve the residents of these districts." West Haven Zoning Resolution, art. 2, c. 1-2.2.

[15] A C-2 district is a commercial local service district. Commercial local service districts "are designed to provide for a wide range of essential local services not involving regular local shopping. Since these establishments are less frequently visited by customers, they tend to break the continuity of prime retail frontage and therefore, hamper the development of convenient shopping. The permitted services create relatively few objectionable influences for nearby residential areas." West Haven Zoning Resolution, art. 3, c. 1-2.2.

[16] An accessory use is defined as "[a] land use located on the same lot or on a contiguous lot under the same ownership in all respects as to title and fractional interest which is incidental

sought approval from the commission to include video games. At the time that this approval was sought, Lewis was the chairman of the commission. George Thomas testified that Lewis "was highly upset that a pool hall was [already] allowed there and he argued strenuously to prevent [the plaintiffs] from putting the video games there. . . . " Lewis' testimony affirms that he had been opposed to the plaintiffs' intentions for the property. The plaintiffs ultimately received the necessary approval[17] and entered into the lease. In August, 1981, the plaintiffs exercised their option to purchase the property, and they operated an amusement center on the property until 1984.

After ceasing operation of the amusement center for business reasons, the plaintiffs attempted to lease the property. After being unsuccessful for approximately two years, the plaintiffs decided instead to develop condominiums on the property. On April 21, 1986, the plaintiffs

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and subordinate to that of the main building or use of the land." West Haven Zoning Resolution, art. 1, c. 3-2.2.

[17] As highlighted during oral argument before this court, it is not clear from Lewis' testimony whether it was the commission or the police that actually had granted the permit to the plaintiffs to allow them to operate a pool hall. During the trial, however, Lewis expressly stated, after having his memory refreshed with newspaper articles that had been entered into evidence, that he had been opposed to the plaintiffs' intentions to operate an amusement center on the property. Thus, viewing these inconsistencies in favor of the plaintiffs, the inference could be drawn that Lewis had disapproved of the plaintiffs' intentions for the property in 1980, and that this disapproval, which was strong enough to be reported by the local newspapers, negatively predisposed him toward the plaintiffs in 1986.

filed a change of zone application with the commission in order to obtain the necessary zone change of both parcels to R-5. The application was presented to the commission on May 13, 1986, at which time Saldibar was the commission chairman and Lewis was the vice chairman.

Lewis characterized the plaintiffs' application as incomplete because it did not include a site plan application. Lewis advised the representative of the architectural firm who spoke in support of the plaintiffs' application that what his client had presented to the commission was not a site plan, and that the plaintiffs "were supposed to come in with a site plan." The director of planning, Michael Roark, clarified, however, that because the plaintiffs were requesting a zone change, it was not necessary that they submit a site plan. In response to Saldibar's insistence that he did not want to continue with the proceeding until the plaintiffs had come back with the "proper documentation," Roark replied that "[the plaintiffs] have the right to the fair process of the law and [a site plan is not required because] they're being heard here on a zone change." After some additional discussion between the commissioners and the plaintiffs' representative, this colloquy occurred again, with Saldibar seeking to halt the proceedings because of the lack of a site plan and Roark advising him that none was needed. After this second exchange, Saldibar appeared to understand that a site plan was not required for a zone change application, and ordered that the hearing continue.

Following several questions from other commissioners, Lewis referred to the plaintiffs' prior use of the property, stating that "[t]his guy made plans for [the amusement center] instead of what we called for and a

pool hall. . . . *We gave this guy everything. Now he comes* with this shit. He's a shrewdy." Saldibar responded that he would "like to have this guy [c]ome back when he's ready," and Lewis moved to "[d]eny with prejudice," prior to the plaintiffs having completed their presentation. Roark instructed the commissioners that they had to listen to the plaintiffs, to which Saldibar responded "alright." Lewis yielded, stating, "[y]ou said we got to listen to him. We do, we listened to him. And that's all there is to it."

The meeting proceeded, with several persons speaking against the proposal, and the plaintiffs' representative being given the opportunity to present a rebuttal. Subsequently, Saldibar asked whether anyone had any comments on the plaintiffs' zone change application, and Lewis responded in the affirmative and was given the opportunity to speak. Lewis recalled the history of the property at issue, stating that, after a fast food restaurant had gone out of business, "[the plaintiffs] converted [the property] into a poolroom and that didn't do any good. Now they want to put condos and they want to put, make it an R-5. I can't *see* it. . . . Number one, the fella didn't have the seal,[18] he didn't have it right, a site plan so at this time I'd like to make a motion that we deny this [application] with prejudice." (Emphasis added.) The remaining commissioners all seconded the motion to

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[18] Earlier in the proceeding, when Lewis was criticizing the plaintiffs' proposal for lacking a site plan, he stated: "This is not a site plan. A site plan has to have the seal of the architect or an engineer." Thus, Lewis apparently believed that a complete site plan application had to bear the requisite seal.

deny the application with prejudice, which Lewis made clear would mean that the plaintiffs "don't come back . . . [f]or a year."

Following their successful appeal to the court, Schimelman, J., the plaintiffs requested a rehearing on their zone change application. On June 23, 1987, with Saldibar and Lewis still holding their respective roles on the commission as chairman and vice chairman, the commission held a public hearing to reconsider the application. After the plaintiffs' application was called, but prior to its presentation, Mayor Azelio M. Guerra addressed the commission to remind it of a certain moratorium that recently had been passed. The moratorium, which had been adopted on August 28, 1986, to be effective September 15, 1986, prohibited, for a certain period of time, the granting of zone change requests that would result in changes to R-5, along with several other zones.

After Guerra had finished speaking and the public hearing was about to resume, Lewis asked Saldibar: "Why are we hearing this?" Saldibar questioned Lewis regarding which application he meant, and Lewis, referring to the plaintiffs' application, stated: "The first one, it was denied twice." The hearing commenced after Saldibar and Lewis were informed by the city's corporation counsel that the plaintiffs' appeal had been sustained because the trial court had found that during the prior hearing, "certain procedural violations had occurred that may have created an unfair hearing for the applicant. . . . "

The plaintiffs' attorney, Dennis Garvey, was the first to speak. In light of the decision "[finding] that two of the

commissioners who are sitting tonight had predetermined the outcome of the hearing and the reason for the reversal was because of their vote," Garvey requested that alternates be appointed for Lewis and Saldibar. Saldibar replied: "Your request is considered and denied." After Lewis expressed his fear that the plaintiffs "could take [them] to court again and [that they would] lose," they sought the advice of the corporation counsel, who recommended that alternates be appointed.[19] Although the record indicates that Saldibar continued to participate in running the meeting, neither Lewis nor Saldibar voted on the plaintiffs' application.[20]

In considering the plaintiffs' motion to dismiss, the trial court in the present case reviewed the audio tapes of both the May 13, 1986 and June 23, 1987 proceedings. Referring to the point during the June 23 hearing at

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[19] Before stepping down, both Lewis and Saldibar wanted to know what they had done wrong in the prior proceeding. Lewis stated that he wanted "to know what the hell I did," to which Saldibar responded "Don, Don, take it easy." They subsequently asked Garvey to read them Judge Schimelman's decision.

In its memorandum of decision in the present case, the trial court, who had listened to the audio tapes of both the May and June hearings, stated that "[a]fter hearing the substance of the [Judge Schimelman's] decision the discussion continued in heated tones."

[20] As discussed earlier in the text of this opinion, the plaintiffs' application again was denied unanimously. The plaintiffs again successfully appealed from this decision to the court, Flanagan, J. The plaintiffs did not, however, thereafter seek a rehearing from the commission, but instead brought the present action.

which Saldibar initially had denied the request to step down and be replaced by an alternate, the court stated: "At this point in the hearing the tapes indicate an attitude of animosity and disdain on the part of . . . Lewis and Saldibar for George Thomas. The court concludes that the conversations and comments revealed on these tapes, viewed in the light most favorable to the plaintiffs, demonstrates that Lewis and Saldibar treated . . . George Thomas with animosity and disdain. Accordingly, the court finds that the plaintiffs have demonstrated that . . . Lewis and Saldibar acted with malice in considering their application of June 23, 1987." (Emphasis added.) We agree with this characterization of the evidence, at least insofar as it concludes that the evidence presented would permit an inference of malice on the part of Lewis and Saldibar. Thus, although the trial court in its memorandum of decision at times framed its determination in terms of its findings, that is not the proper inquiry in ruling on a motion to dismiss under Practice Book § 15-8. On such a motion, the court is confined to determining whether the plaintiff's evidence, if believed and if given the benefit of all favorable inferences, makes out a prima facie case. *See New England Savings Bank v. Bedford Realty Corp., supra,* 246 Conn. at 608, 717 A.2d 713. The court, on such a motion, may not make findings of fact, either favorable or unfavorable to the plaintiff.

The trial court ultimately rejected each of the plaintiffs' claims. With regard to the individual commissioners, the court first concluded "that merely because the [plaintiffs submitted evidence of a number of zone change] applications [that] were before the board on a request for a zone change does not demonstrate that the

various applicants were similarly situated for purposes of a claim of equal protection." The trial court subsequently rejected the evidence proffered by the plaintiffs because "[n]one of the applications referred to by the plaintiffs involved a similar zone change request from a commercial/residential zone to a residential zone." Next, the court stated that "even if the court assume[d], arguendo, that each application was similarly situated . . . the plaintiffs have failed to establish that the commission treated their application selectively. . . . [T]he plaintiffs' evidence does not demonstrate that the commission did not require a site plan from the other applicants during the time that the procedure was in place." The court thus determined that "the plaintiffs ha[d] not met their burden of demonstrating that they were either similarly situated to others or selectively treated." With regard to the city and the commission, the court concluded that "[a] review of the evidence adduced at trial reveal[ed] that the plaintiffs ha[d] not demonstrated that they were denied a constitutional right by the municipal defendants," and dismissed the plaintiffs' claims, stating "that when the evidence is viewed in the light most favorable to the plaintiffs it fails to demonstrate the denial of equal protection. . . . "[21]

We first consider the trial court's conclusion that the evidence submitted by the plaintiffs regarding other zone change applications before the commission was insufficient to allow the inference that these applicants were

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[21] The trial court also found that the plaintiffs had failed to demonstrate "an unconstitutional taking." As we have indicated; *see* footnote 9 of this opinion; the plaintiffs do not pursue that claim on appeal.

similarly situated to the plaintiffs. In this connection, we note that, because " 'selective enforcement is a murky [area] of equal protection law in which there are surprisingly few cases' "; *Zahra v. Southold, supra,* 48 F.3d at 683; and because the cases from the Second Circuit do not provide much guidance on the nature of the "similarly situated" requirement in an action involving an alleged equal protection violation based on selective treatment, we broaden our review to include relevant decisions from other circuits.

In *Esmail v. Macrane,* 53 F.3d 176 (7th Cir.1995), the court considered a case involving facts similar to those before us. The plaintiff, a liquor dealer, alleged equal protection violations against the mayor and city officials who allegedly held a " 'deep-seated animosity' " toward him, which had arisen from prior political dealings between the parties, and from the fact that the plaintiff successfully had appealed a prior revocation of his license. *Id.,* at 178. The plaintiff alleged that the mayor had initiated a "campaign of vengeance" against him, that included, among other things, the denial of his liquor license applications "on the basis of trivial or trumped-up charges while maintain[ing] a policy and practice of routinely granting new liquor licenses as well as renewing existing licenses requested by persons who had engaged in the same or similar conduct. . . . " (Internal quotation marks omitted.) *Id.*

Recognizing that the case before it was "an unusual kind of equal protection case," the Court of Appeals in Esmail characterized the plaintiff's complaint as alleging "an orchestrated campaign of official harassment directed against him out of sheer malice." *Id.,* at 178-79. The

District Court had dismissed the action because the plaintiff had not alleged that other applicants had received grants or renewals at the same time as he, or that anyone who had committed the same violation as the plaintiff had not been sanctioned. The Court of Appeals reversed the District Court's dismissal of the action, concluding that "equal protection does not just mean treating identically situated persons identically. If a bad person is treated better than a good person, this is just as much an example of unequal treatment as when a bad person is treated better than an equally bad person or a good person worse than an equally good person." *Id.*, at 179. Applying this rationale to the facts before it, the court concluded that "[i]f the liquor dealers enumerated in [the plaintiff's] complaint committed worse infractions than he was charged with but were let off with lighter or no sanctions, this was unequal treatment." *Id.* The court explained that if the plaintiff was able to show that this unequal treatment was "the result solely of a vindictive campaign by the mayor," that conduct would violate the equal protection clause. *Id.*

We are persuaded by this reasoning, and view it as useful in our determination of whether the plaintiffs were "similarly situated" to other zoning applicants. "[E]qual protection does not just mean treating identically situated persons identically." (Emphasis added.) *Id.* Moreover, the requirement imposed upon "[p]laintiffs claiming an equal protection violation [is that they] identify and relate specific instances where persons situated similarly in all relevant aspects were treated differently. . . . *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 19 (1st Cir.1989)."

(Emphasis added; internal quotation marks omitted.) *Rubinovitz v. Rogato*, 60 F.3d 906, 910 (1st Cir.1995).[22]

In a situation such as that presented by the facts of this case, which involves the alleged selective treatment by public officials who, under the statutes of this state and the regulations of the city, possess broad discretion in decisions relating to zone change applications; *see* footnote 26 of this opinion; the factors that render applicants similarly situated for comparison purposes necessarily are based upon the procedural requirements imposed on those seeking to obtain zone changes. The appropriate group for comparison to the plaintiffs, therefore, includes all applicants who were before the commission requesting a zone change during the same general time period as the plaintiffs, and who thus, theoretically, were subject to the same rules and requirements. Furthermore, given the

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[22] The plaintiffs in *Rubinovitz v. Rogato, supra*, 60 F.3d at 909, had alleged, among other things, that the selective enforcement of certain state plumbing and gas codes had violated their equal protection rights. Concluding that, "[a]s to code-enforcement . . . the record contains sufficient evidence of selective treatment to forestall summary judgment"; *id.*, at 910; the court did not focus on the characteristics of the properties alleged by the plaintiffs to be similarly situated for comparison purposes, but, instead, was persuaded by the fact that the plaintiffs had offered an "affidavit of [the] city plumbing inspector . . . in which he states that (1) he had encountered other instances where there was plumbing but no permits and (2) he did not order the plumbing disconnected, as he had with the [plaintiffs]." *Id.* Similarly, the focus in the present case should not be on whether the actual properties and the changes requested were identical, but, rather, on whether the applicants were similarly situated with regard to the process and rules to which they were subject.

inherently unique characteristics associated with any parcel of land, and the numerous combination of zone changes that could be requested by an applicant, if we were to adopt the narrow focus undertaken by the trial court and advocated by the defendants, the officials and the processes associated with zone changes could be insulated significantly from the purview of the equal protection clause. We do not regard the equal protection clause as so narrow in scope.

We next consider the trial court's determination, emphasized by the defendants on appeal, that "even if the court assume[d], arguendo, that each application was similarly situated . . . the plaintiffs have failed to establish that the commission treated their application selectively. . . . [T]he plaintiffs' evidence does not demonstrate that the commission did not require a site plan from the other applicants during the time that the procedure was in place." According to the court, "[a]t trial, Lewis and Saldibar testified that the commission's procedure was to require a site plan with all zone change applications. The commission discontinued this procedural requirement after the court, Schimelman, J., and the corporation counsel for [the city] informed them that a site plan was not required by the regulations."

Initially, we reiterate that whether the evidence demonstrated that the commission actually required a site plan from other applicants during the requisite time period was not the issue before the trial court on the motion to dismiss, and it is not the issue presented to us. Rather, the issue is whether the evidence presented, viewed in the light most favorable to the plaintiffs, permitted the inference that, during the general period of

time when the plaintiffs submitted their application, a site plan was not required from those similarly situated to the plaintiffs, namely, zone change applicants generally. We conclude that the evidence supported this inference.

First, there was evidence to support the inference that there had never been a site plan requirement, and that the plaintiffs – who were penalized in May, 1986, for not having a site plan – were treated selectively by the defendants. During oral argument before this court, Lewis and Saldibar conceded that there is not and has never been any requirement that an applicant must submit a site plan with an application for a zone change. This statement is consistent with that made by Roark to Lewis and Saldibar during the May proceedings, in which he advised them that it was not necessary for the plaintiffs to submit a site plan with their zone change application.[23]

Moreover, the city's zoning regulations require "[p]etitioners [for changes in zoning designations to] submit such documents to the Planning and Zoning Commission as is found necessary for reaching a fair and impartial decision, including maps, and preliminary plans, as well as a written description of scope and content of the proposed development. . . . " West Haven Zoning Resolution, art. 7, c. 2-1. During the trial, Saldibar affirmed that there is no mention of a site plan in the

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[23] The conversation that occurred during the May, 1986 hearing between the representative who spoke for the plaintiffs and Roark, indicates that after clarifying that the plaintiffs were seeking a "zone change with a conceptual plan that's basically nonbinding," Roark was satisfied that a site plan was not required.

regulations' listing of the documents that must accompany an application for a change of zone. In fact, the chapter entitled "Site Plan Review and Approval," is not included in the chapter governing "Requested Changes in Zoning Designations." *See* West Haven Zoning Resolution, art. 7, c. 4. This, too, was affirmed by Saldibar during the trial. Similarly, the application form for a change in zone designation does not mention a site plan, indicating only that submissions must include a filing fee, maps, "preliminary plans [and] a written description of [the] scope and content of the proposed development." There is no reference to a site plan. During the trial, Lewis confirmed that the zone change application form made no mention of a site plan.

The inference that there never had been a site plan requirement further was supported by evidence indicating that at least two zone change applications had been approved without site plans during 1986. The first application was considered and granted by the commission during its July 14, 1986 meeting. This application requested a zone change from C-2 and R3-2 to R-4, for property located at 996-998 Campbell Avenue. As previously noted, the plaintiffs' property also was zoned C-2 and R3-2. The attorney for Lewis and Saldibar expressly conceded that "going from a C-2, R3-2 zone to either R-4 or R-5" was a "substantially similar" request. Although he further maintained that the zone change applications were dissimilar, based, in part, on the alleged differences in the physical areas surrounding both properties,[24]

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[24] The attorney also distinguished the properties based on the fact that the site plan requirement purportedly had changed

Saldibar contradicted this testimony by testifying that the mix of businesses surrounding the two properties "could be considered similar." Although we previously have concluded that the inference can be drawn that any zone change application before the commission during 1986 was similarly situated to the plaintiffs' application, we note that, when this testimony is viewed in the light most favorable to the plaintiffs, the inference could be drawn that these properties were, in fact, physically similar.

The second application, which was for property located at 321 Highland Street, was approved by the commission without a site plan on December 9, 1986. The minutes of that hearing indicate the following: "Questions were asked regarding how much area was involved, how many stories and what was the site plan. [The representative for the applicant] responded that there was over an acre involved, that the building would be two . . . stories and shrubs, trees and lawn would be planted." Roark responded that "a site plan review would be required in the future," indicating his recognition that the applicant had addressed all of the questions posed except those regarding a site plan, and that this omission did not preclude the commission from considering the application. The minutes further indicate that it was "Lewis [who] presented a motion to adopt the zone change from R3-1 to C-5 which was seconded. . . . The motion was approved unanimously." At trial, Lewis could not recall having approved this application, and stated that he did

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in July, 1986. The evidence regarding when, and if, the site plan requirement was abolished will be discussed in the text of this opinion.

not know whether Roark's comments regarding a site plan being required in the future meant that no site plan had been presented to the commission during the December 9, 1986 hearing. Nonetheless, this evidence permits the inference that this zone change application was not accompanied by a site plan application when it was approved by the commission in December, 1986.

Second, there was evidence to support the inference that, even if the commission, as a matter of custom and practice, had imposed a site plan requirement despite the absence of such a requirement in the zoning regulations, such a custom and practice had ended in either August, 1986, or after the decision by Judge Schimelman was published in January, 1987, and that at least one other zone change application had been approved without a site plan prior to the effective date of the change. This evidence, therefore, further supported the inference that the plaintiffs were treated selectively by the defendants when they were penalized for not having a site plan in May, 1986. Saldibar testified that, although there had been a policy of requiring site plans with zone change applications, this requirement was abolished in either "July or the beginning of August, [1986]." As discussed previously, the plaintiffs offered evidence that the 996-998 Campbell Avenue application for a zone change had been granted without a site plan on July 14, 1986. Thus, viewing Saldibar's testimony most favorably to the plaintiffs, the inference can be drawn that the abolition of the site plan requirement did not occur until August, 1986 – after the zone change request for the Campbell Avenue property had been granted without a site plan.

Furthermore, the trial court found that the commission had "discontinued this procedural requirement after the court, Schimelman, J., and the corporation counsel for [the city] informed them that a site plan was not required by the regulations." Although the corporation counsel testified at trial that the change occurred before Judge Schimelman's decision was released, he could not testify as to when the change occurred. The transcript of the June 23, 1987 hearing, however, indicates that on January 15, 1987, the corporation counsel had sent a letter to Saldibar advising him that Judge Schimelman had sustained the plaintiffs' appeal "based upon the confusion which has permeated most of the planning and zoning hearings. . . . " He subsequently recommended an "immediate change . . . so as to clarify the procedures. . . . " During the June, 1987 hearing, however, Lewis and Saldibar indicated that they were not aware of the January decision and asked that Garvey read it to them. *See* footnote 19 of this opinion. Thus, viewing this evidence most favorably to the plaintiffs, the inference can be drawn that any site plan requirement was the result of an unofficial practice of the commissioners, rather than an express regulation, and consequently, the change in the site plan requirement occurred in either January or June, 1987, when the commissioners had actual notice of the trial court's decision. Under either scenario, it further can be inferred that the application for the change of zone for the Highland Street property that was approved without a site plan in December, 1986, had been approved before the customary practice had been changed.

In summary, when all of the evidence on the alleged site plan requirement is viewed most favorably to the

plaintiffs, the inference can be drawn that either there never was a site plan requirement, or that there was an implicit site plan requirement and that this requirement was abolished either: (1) during August, 1986; or (2) at some point after publication of the decision by Judge Schimelman on January 9, 1987; or (3) on June 23, 1987, the date that Saldibar and Lewis first claimed to have learned of Judge Schimelman's decision. Because the plaintiffs, who were penalized for not having a site plan in May, 1986, offered evidence that zone change applications were approved by the commission without site plans during both July and December, 1986, we conclude that the plaintiffs established a prima facie case that they were treated selectively and maliciously by the defendants.

The defendants contend, however, that because neither Lewis nor Saldibar voted at the June 23, 1987 rehearing on the plaintiffs' application, the denial of the application at that meeting cannot be attributed to their conduct and, therefore, no inference may be drawn that the plaintiffs suffered selective treatment animated by Lewis' and Saldibar's malicious and bad faith intent to injure them. We are not persuaded.

We agree with the decisions of those courts that have recognized that when a government official acts as the moving force behind a deprivation of a plaintiff's constitutional rights, this is sufficient for liability under § 1983. *Malley v. Briggs*, 475 U.S. 335, 344 n. 7, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (§ 1983 is read against background of tort liability that makes one responsible for natural consequences of his actions); *Jeffries v. Harleston*, 21 F.3d 1238, 1247 (2d Cir.1994) ("[a] plaintiff may establish causation

under section 1983 if he shows that the defendants participated in, or were 'moving forces' behind, the deprivation"), *rev'd on other grounds*, 52 F.3d 9 (2d Cir.1995); *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 561 (1st Cir.1989) ("[t]he requisite causal connection [for liability under § 1983] can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict constitutional injury"); *see also Warner v. Orange County Dept. of Probation*, 115 F.3d 1068, 1071 (2d Cir.1996) ("an actor [sued under § 1983] may be held liable for those consequences attributable to reasonably foreseeable intervening forces, including the acts of third parties").

Thus, the fact that Lewis and Saldibar did not vote on the June 23, 1987 rehearing on the plaintiffs' application is not fatal to the plaintiffs' prima facie case. We conclude that the evidence previously discussed, regarding how Lewis and Saldibar, prominent members of the commission, acted toward the plaintiffs throughout the course of the zone change application review process, would support the inference that their conduct influenced the votes of the other commissioners.

II

The plaintiffs next claim that the trial court improperly dismissed their action against the city and the commission because the plaintiffs had established a prima facie case that Lewis and Saldibar, in their capacities as policy makers for the city, caused the plaintiffs to be

deprived of their constitutional rights. We conclude that the evidence supports the inference that the actions of the commission, with regard to its consideration of the plaintiffs' zone change application, constituted a municipal policy of the city, and that, therefore, the plaintiffs had established a prima facie case against the city and the commission.

In *Monell v. Dept. of Social Services,* 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the United States Supreme Court overruled in part *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961),[25] and held that "[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts injury that the government as an entity is responsible under § 1983." *Monell v. Dept. of Social Services, supra,* at 694, 98 S.Ct. 2018.

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[25] The court in *Monell v. Dept. of Social Services, supra,* 436 U.S. at 663, 98 S.Ct. 2018, overruled *Monroe* only "insofar as it holds that local governments are wholly immune from suit under § 1983," and expressly upheld *Monroe* "insofar as it holds that the doctrine of respondeat superior is not a basis for rendering municipalities liable under § 1983 for the constitutional torts of their employees." *Id.,* at 663-64 n. 7, 98 S.Ct. 2018.

In *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), the United States Supreme Court further elaborated on the scope of municipality liability under § 1983. In *Pembaur*, the court considered the "official policy" requirement discussed in *Monell*, and concluded that "it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." *Id.*, at 480, 106 S.Ct. 1292. "If the decision to adopt [a] particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood." *Id.*, at 481, 106 S.Ct. 1292. Further defining the limits of this definition, the court held that "municipal liability under § 1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives by the officials or officials responsible for establishing final policy with respect to the subject matter in question." *Id.*, at 483, 106 S.Ct. 1292.

Noting that the courts of appeals had not applied these principles consistently, the United States Supreme Court, in *St. Louis v. Praprotnik*, 485 U.S. 112, 124, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988), "set out again to clarify the issue that we last addressed in *Pembaur*." The court stated: "Two Terms ago, in *Pembaur* . . . we undertook to define more precisely when a decision on a single occasion may be enough to establish an unconstitutional municipal policy. Although the Court was unable to settle on a general formulation, Justice Brennan's opinion articulated several guiding principles. First, a majority of the Court agreed that municipalities may be held liable under § 1983 only for acts for which the municipality itself is

actually responsible, that is, acts which the municipality has officially sanctioned or ordered. . . . Second, only those municipal officials who have final policymaking authority may by their actions subject the government to § 1983 liability. . . . Third, whether a particular official has final policymaking authority is a question of state law . . . . Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business." (Citations omitted; internal quotation marks omitted.) *Id.*, at 123, 108 S.Ct. 915. During oral argument before this court, the city and the commission conceded that the first three of these requirements were satisfied in the present case. The question, therefore, is whether there was sufficient evidence to support a finding that the fourth requirement was met.

The United States Supreme Court recently clarified the proof necessary for a plaintiff to prevail in a § 1983 action when he or she is alleging a constitutional violation that consists of a single act by an authorized decision maker of the municipality. In *Board of County Commissioners v. Brown*, 520 U.S. 397, 404, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997), the court first affirmed that "it is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." Significantly, the court held that "[i]n any § 1983 suit, however, the plaintiff must establish the state of mind required to prove the underlying violation. Accordingly, proof that a municipality's legislative body or authorized decisionmaker has intentionally deprived a

plaintiff of a federally protected right necessarily establishes that the municipality acted culpably. Similarly, the conclusion that the action taken or directed by the municipality or its authorized decisionmaker itself violates federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains." (Emphasis added.) *Id.*, at 405, 117 S.Ct. 1382. Finally, the court confined the breadth of its decision by holding that "[a] plaintiff must [also] demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision." (Emphasis added.) *Id.*, at 411, 117 S.Ct. 1382.

The defendants conceded, both in their brief and during oral argument before this court, that "the [commission] is capable, in some cases, of making municipal policy. . . . "[26] They maintain, nonetheless, that the

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[26] Our statutes delegate great authority to local zoning commissions. General Statutes § 8-2(a) provides in relevant part: "The zoning commission of each city, town or borough is authorized to regulate, within the limits of such municipality, the height, number of stories and size of buildings and other structures . . . the density of population and the location and use of buildings. . . . Such zoning commission may divide the municipality into districts of such number, shape and area as may be best suited to carry out the purposes of this chapter; and, within such districts, it may regulate the erection, construction, reconstruction, alteration or use of buildings or structures and the use of land. . . . "

General Statutes § 8-3(a) provides in relevant part: "Such zoning commission shall provide for the manner in which regulations under section 8-2 and the boundaries of zoning districts shall be respectively established or changed. . . . "

plaintiffs failed to establish their prima facie case of an equal protection violation because "a single act does not necessarily become municipal policy . . . and [the plaintiffs] ha[d] not . . . proven [that] there were repeated acts of constitutional violations." Although the defendants are correct in their assertion that a single act does not necessarily become municipal policy, the United States Supreme Court has decided that when an "authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right [this] necessarily establishes that the municipality acted culpably. Similarly, the conclusion that the action taken or directed by the . . . authorized decisionmaker itself violates federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains." (Emphasis added.) *Board of County Commissioners v. Brown, supra,* 520 U.S. at 405, 117 S.Ct. 1382. Thus, the defendants are incorrect in their argument that the plaintiffs' action necessarily must be dismissed because of their failure to prove repeated acts of constitutional violations.

The city's resolution on planning and zoning expressly provided that the "Commission shall have all the powers and duties conferred and imposed by the General Statutes of the State of Connecticut on Planning and Zoning Commissions"; West Haven Zoning Resolution, art. 7, c. 1-4; thereby delegating all of the available state statutory powers to the commission. Thus, there is no question that, at least for the purposes of establishing a prima facie case, the inference can be drawn that the commission acted as a policy maker for the city with regard to denying the plaintiffs' zone change application.

In light of the United States Supreme Court's recent decision in Board of County Commissioners,[27] and our determination that an inference can be drawn that Lewis and Saldibar selectively treated the plaintiffs in violation of their constitutional rights, we conclude that the plaintiffs submitted evidence sufficient to establish the inference that "the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business." *St. Louis v. Praprotnik, supra,* 485 U.S. at 123, 108 S.Ct. 915.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other justices concurred.

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[27] The Seventh Circuit Court of Appeals, in one of the few federal cases to have applied *Board of County Commissioners v. Brown, supra,* 520 U.S. at 405, 117 S.Ct. 1382, recently affirmed a jury's verdict in favor of the plaintiff against the defendant county. Explaining its decision, the Court of Appeals noted that the United States Supreme Court had decided that plaintiffs could satisfy their burden of establishing "[a] constitutional injury [that] is caused by a municipal policy, custom or practice . . . with proof that the deprivation of the federally protected right was intentionally caused by the municipality's legislative body or authorized decision-maker." (Citations omitted; internal quotation marks omitted.) *Hulbert v. Wilhelm,* 120 F.3d 648, 655-56 (7th Cir.1997). The Court of Appeals subsequently held that the jury's conclusion that the county was liable to the plaintiff for the county corporation's actions, which included a reprimand and the ultimate downgrading of the plaintiff's job level in retaliation for his exercising his freedom of speech, "was supported by the evidence and consistent with the law on municipal liability as recently explained by the Supreme Court." *Id.,* at 656.

George THOMAS et al.

v.

CITY OF WEST HAVEN et al.

No. CV 890284555S.
Superior Court of Connecticut.
July 30, 1997.

MEMORANDUM OF DECISION
RE MOTIONS TO DISMISS

MEADOW.

Procedural History

The present case arises from two denials of the plaintiffs', George Thomas, Barbara Thomas and John Finnel, requested zone change by the defendants, the City of West Haven, the Planning and Zoning Commission of the City of West Haven (Commission), and the individual members of the Commission, Lewis and Saldibar.

On April 1, 1986, the plaintiffs applied to the Commission for a change of zone classification of the plaintiffs' property from C-2 (commercial – local service) on one parcel and R3-2 (residential – two family) on the other to R-5 (apartment building) on both parcels to allow for conversion of the existing building on the property to residential condominium units. After conducting a public hearing on the plaintiffs' application on May 13, 1986, the Commission denied the plaintiffs' application on May 20, 1986.

On June 16, 1986, the plaintiffs, in the name of T.F. Builders, applied for a change of zone classification of

their property from C-2 and R3-2 to CM (mixed – commercial and multi-family) to allow for conversion of the building on the property to residential and commercial condominium units. After a public hearing on July 14, 1986, the Commission denied the zone change application on July 22, 1986.

The plaintiff appealed to the Superior Court, pursuant to General Statutes § 8-8. The Court, Schimelman, J., sustained the appeal on the ground that, in denying the zone change application of May 13, 1986, the Commission acted illegally, arbitrarily and in abuse of discretion in that its decision was predetermined and based upon a personal prejudice against Thomas.[1] *Thomas v. City of West Haven, Superior Court, judicial district of New Haven at New Haven,* Docket No. 284555 (January 9, 1987) (Schimelman, J.).

After the Superior Court sustained the appeal, the plaintiffs' April 1, 1986 zone change application was reactivated at the request of the plaintiffs. On June 23, 1987,

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[1] The plaintiffs appealed both of the [sic] these denials and the appeals were consolidated and heard by the court, Schimelman, J. As to the June 16, 1986 application, the court found that: "Plaintiff's second application for change of zone to CM and appeal therefrom raises the same predetermination issues as well as the claim that the first application prejudiced plaintiff, since defendant's decision was colored by the first application and denial thereof. A review of the record in the second appeal shows no predetermination, no evidence of any unfairness at the hearing nor any indication that the first application played any significant part in denial of the second application." *Thomas v. City of West Haven, Superior Court, judicial district of New Haven at New Haven,* Docket No. 284555 (January 9, 1987) (Schimelman, J.).

the Commission reconsidered the plaintiffs' application at a public hearing. At the hearing, the defendant Guerra spoke in opposition to the spot zoning. On July 1, 1987, the plaintiffs were notified that the Commission had again denied their zone change application.

The plaintiffs appealed to the Superior Court, pursuant to General Statutes § 8-8, from the second denial of their zone change application. The Court, Flanagan, J., sustained the plaintiffs' appeal on the ground that the Commission acted with predisposition and predetermination in denying the plaintiffs' application. In reaching its conclusion, the court found that certain Commission members, in particular Saidibar [sic] and Lewis, created an atmosphere of hostility toward Thomas, preventing the plaintiffs from getting the fair hearing to which they were entitled. *Thomas v. City of West Haven, Superior Court, judicial district of New Haven at New Haven,* Docket No. 284555 (June 22, 1988) (Flanagan, J.).

The plaintiffs then instituted a civil action against the defendants. In a six-count amended complaint filed on October 19, 1989 the plaintiffs allege (1) a taking of the plaintiffs' land without due process in violation of article first of the Connecticut constitution and the fifth and fourteenth amendments of the United States constitution, (2) a denial of due process of law in violation of article first of the Connecticut constitution and the fifth and fourteenth amendments of the United States constitution, redress for which is provided by 42 U.S.C. § 1983 and (3) a denial of equal protection in violation of article first of the Connecticut constitution and the fifth and fourteenth amendments of the United States constitution, redress for which is provided by 42 U.S.C. § 1983. The defendants

filed an amended answer and/or special defense to the plaintiffs' amended complaint on May 18, 1993, June 28, 1993 and May 16, 1994.

On competing motions for summary judgment, the court, Gordon, J., granted summary judgment in favor of the defendants on the federal due process claim on August 24, 1995. *Thomas v. City of West Haven, Superior Court, judicial district of New Haven at New Haven,* Docket No. 284555 (August 24, 1995) (Gordon, J.).[2] The commissioners then filed a combined motion to dismiss, motion to strike, motion for permission to file a motion for summary judgment and a motion for summary judgment on June 5, 1996. The court, Booth, J., denied the motion to dismiss and the motion for permission to file a motion for summary judgment and granted the motion to strike the state due process claim. *Thomas v. City of West Haven, Superior Court, judicial district of New Haven at New Haven,* Docket No. 284555, 17 CONN. L. RPTR. 425 (July 24, 1996) (Booth, J.).

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[2] A review of the record indicates that the motion for summary judgment was filed by the Commission and West Haven. The court found that the plaintiffs had no "clear entitlement" to the property interest sought and stated that the due process claim fails as a matter of law. The plaintiffs filed a motion for reconsideration which was granted by the court, Gordon, J. At that time, in a handwritten note, the court ruled that: "After reconsideration the prior judgment stands as to the federal due process claim. Further, judgment enters in favor of the defendants as to the state due process claim. *See Kelly Products Development, Inc. v. Lebanon,* 226 Conn. 314, [627 A.2d 9041 (1993) . . . " *Thomas v. City of West Haven, Superior Court, judicial district of New Haven at New Haven,* Docket No. 284555 (February 1, 1996) (Gordon, J.).

The case went to trial and the plaintiffs presented their case in chief. After the plaintiffs rested, the defendants moved to dismiss the remaining counts of the revised complaint for failure to make out a prima facie case pursuant to Practice Book § 302.[3] The plaintiffs filed a memorandum in opposition to the motion to dismiss.

DISCUSSION

"A trial court can dismiss a cause of action where it believes the plaintiff failed to make out a prima facie case. Practice Book § 302; *Season-All Industries, Inc. v. R.J. Grosso, Inc.*, 213 Conn. 486, 493, 569 A.2d 32 (1990). '[W]hen the evidence produced by the plaintiff, if fully believed, would not permit the trier in reason to find the essential issues on the complaint in favor of the plaintiff,' dismissal pursuant to Practice Book § 302 is appropriate." *Hinchliffe v. American Motors Corp.*, 184 Conn. 607, 609, 440 A.2d 810 (1981); *Gulycz v. Stop & Shop Co.*, 29 Conn.App. 519, 523, 615 A.2d 1087 (1992). A § 302 motion is properly considered at the close of the plaintiffs' evidence. *Carnese v. Middleton*, 27 Conn.App. 530, 539, 608 A.2d 700 (1992).

"In considering a motion under Practice Book § 302, a trial court must consider all of the plaintiff's evidence to be true. *Hinchliffe v. American Motors Corp., supra,* [184 Conn.] 609-10; *Botmer v. Kocet*, 6 Conn.App. 595, 603, 507

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[3] Practice Book § 302 provides, in pertinent part, that: "If, on the trial of any issue of fact in a civil action tried to the court, the plaintiff has produced his evidence and rested his cause, the defendant may move for judgment of dismissal, and the court may grant such motion, if in its opinion the plaintiff has failed to make out a prima facie case . . . "

A.2d 129 (1986). Further, a trial court must draw all inferences in the plaintiff's favor. *Pagni v. Corneal,* 13 Conn.App. 468, 470, 537 A.2d 520, *cert. denied,* 207 Conn. 810, 541 A.2d 1239 (1988)." *Walshon v. Walshon,* 42 Conn.App. 651, 654, 681 A.2d 376 (1996), quoting *Discover Leasing, Inc. v. Murphy,* 33 Conn.App. 303, 307-08, 635 A.2d 843 (1993).

The plaintiffs seek redress pursuant to 42 U.S.C. § 1983. "Section 1983 of 42 U.S.C. is available to redress deprivations under color of state law of rights, privileges and immunities secured by federal statutes as well as by the constitution." *Fetterman v. University of Connecticut,* 192 Conn. 539, 549, 473 A.2d 1176 (1984), citing *Maine v. Thiboutot,* 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1979)." [T]he touchstone of [a] § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution [sic] . . . " (Citations omitted; internal quotation marks omitted.) *Tedesco v. Stamford,* 215 Conn. 450, 456, 576 A.2d 1273 (1990).

State courts have concurrent jurisdiction with federal courts with regard to a 42 U.S.C. § 1983 cause of action. *Red Maple Properties v. Zoning Commission,* 222 Conn. 730, 739 n. 7, 610 A.2d 1238 (1992). Thus, "[t]he decisions of the federal circuit in which a state court is located are entitled to great weight in the interpretation of a federal statute. This is particularly true in 42 U.S.C. cases. *Id.*

Unconstitutional Taking

The first and fourth counts of the plaintiffs' amended complaint allege a taking of the plaintiffs' land without

due process of law in violation of the fifth and fourteenth amendments to the United States constitution and in violation of article first, §§ 8 and 11 of the Connecticut constitution.

In order to receive compensation for an alleged taking pursuant to the United States constitution, the United States Supreme Court has "described at least two discrete categories of regulatory action as compensable . . . The first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property . . . The second situation . . . is where the regulation denies all economically beneficial or productive uses of land." (Citations omitted.) *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

"The word "taken" in article first, 11 of our state constitution means the exclusion of the owner from his private use and possession, and the assumption of the use and possession for the public purpose by the authority exercising the right of eminent domain . . . Although property may be 'taken' without any actual appropriation or physical intrusion . . . there is no taking in a constitutional sense unless the property cannot be utilized for any reasonable and proper purpose . . . as where the economic utilization of the land is, for all practical purposes, destroyed . . . A constitutional taking occurs when there is a substantial interference with private property which destroys or nullifies its value or by which the owner's right to its use or enjoyment is in a substantial degree abridged or destroyed . . . " (Citations omitted; internal quotation marks omitted.) *Tamm v. Burns*, 222 Conn. 280, 284, 610 A.2d 590 (1992).

"Zoning regulations, so far as they reasonably promote the public health, safety and welfare, are constitutional even though their effect may be to limit the exercise of private property rights . . . An ordinance which permanently restricts the use of land for any reasonable purpose, however, goes beyond permissible regulation and amounts to 'practical confiscation.' " (Citation omitted; internal quotation marks omitted.) *Chevron Oil Co. v. Zoning Board of Appeals*, 170 Conn. 146, 151, 365 A.2d 387 (1976).

"[W]e have held that zoning reclassifications can constitute an unconstitutional taking when they leave a property owner with no economically viable use of his land other than exploiting its natural state . . . Our cases that have found a taking by practical confiscation have involved situations that required a landowner to leave his property in essentially its natural state. *See Bartlett v. Zoning Commission*, 161 Conn. 24, 282 A.2d 907 (1971); *Dooley v. Town Plan & Zoning Commission*, 151 Conn. 304, 197 A.2d 770 (1964)." (Citation omitted; internal quotation marks omitted.) *Bauer v. Waste Management of Connecticut*, 234 Conn. 221, 254-55, 662 A.2d 1179 (1995).

The plaintiffs have not alleged or introduced any evidence to demonstrate that West Haven has rezoned their property leaving the property owner with no economically viable use of the land. In fact, the plaintiffs agree that the land, as presently zoned, has valuable use. Although, the plaintiffs contend that the property's best and highest use would have been achieved if the zone change were granted, the Supreme Court in *State National Bank v. Planning & Zoning Commission*, 156 Conn. 99, 104, 239 A.2d 525 (1968), rejected an unconstitutional taking

claim based on such an argument. Accordingly, it is irrelevant to the issue of taking whether the plaintiffs may have made more money from the property if the zone change were granted.

"Short of regulation which finally restricts the use of property for any reasonable purpose resulting in a 'practical confiscation,' the determination of whether a taking has occurred must be made on the facts of each case with consideration being given not only to the degree of diminution in the value of the land but also to the nature and degree of public harm to be prevented and to the alternatives available to the landowner . . . The financial effect on a particular owner must be balanced against the health, safety and welfare of the community . . . " (Internal quotation marks omitted.) *Bauer v. Waste Management of Connecticut, supra,* 234 Conn. 256.

"The financial burden imposed on a landowner by a regulation is measured by the extent to which the regulation interferes with the property owner's reasonable investment-backed expectations of use of the property . . . A regulation does not constitute a compensable taking if it does not infringe on such reasonable investment-backed expectations." *Bauer v. Waste Management of Connecticut, supra,* 234 Conn. 257.

The plaintiffs have introduced evidence to show that they expended money in preparing their application for presentation to the Commission. The court concludes that the mere preparation of a zone change application is not an investment-backed expectation of use of the property. Furthermore, assuming, arguendo, that the mere preparation of the application rose to the level of investment-

backed expectation of use of the property, the court finds that the plaintiffs have not demonstrated that the expectation was reasonable in light of the discretion vested with the Commission in granting a zone change. *See Thomas v. City of West Haven, Superior Court, judicial district of New Haven at New Haven,* Docket No. 284555, 17 CONN. L. RPTR. 425 (July 24, 1996) (Booth, J.) (the court emphasized that the plaintiffs did not have a "clear entitlement" to the zone change). In addition, the evidence demonstrates, and the plaintiffs do not deny, that the property has a current use and value of which they were never deprived. The plaintiffs have had offers to buy the property and there are commercial tenants currently using the property. The court therefore concludes that, as a matter of law, the plaintiffs have not presented a prima facie case demonstrating that any of the defendants committed an unconstitutional taking pursuant to the Connecticut or United States constitutions.

Equal Protection & 42 U.S.C. § 1983

The third and sixth counts of the plaintiff's amended complaint allege a denial of equal protection of the laws pursuant to the United States and Connecticut constitutions. The plaintiffs allege that the redress for a violation of federal equal protection is from 42 U.S.C. § 1983.[4] In

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[4] The plaintiff have [sic] not alleged a state statute or common law doctrine that provides redress for a violation of state equal protection secured pursuant to article first, § 20 of the Connecticut constitution. In *Kelley Property Development, Inc. v. Lebanon,* 226 Conn. 314, 627 A.2d 909 (1993), the Supreme Court specifically declined to create a cause of action for money

essence the plaintiffs allege that the defendants, acting in concert, conspired to single them out for selective treatment based on a malicious or bad faith intent to injure the plaintiffs. The court will address the plaintiffs' prima facie case as to the individual and municipal defendants separately because the plaintiffs have alleged and must prove different elements with respect to these defendants.

Individual Defendants

"The concept of equal protection under both the federal and state constitutions has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." *Franklin v. Berger,* 211 Conn. 591, 594, 560 A.2d 444 (1989), quoting *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). "Connecticut affords the same meaning to the equal protection clause set forth in the article first, 20 of the state constitution as is given to

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damages for the violation of a state constitutional right, holding that the court should not construe Connecticut's "constitution to provide a basis for the recognition of a private damages action for injuries for which the legislature has provided a reasonably adequate statutory remedy." *Id.,* 339, 627 A.2d 909. The plaintiffs have urged the court to fashion a remedy pursuant to the *Bivens* doctrine. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). For the reasons stated in *Czap v. Town of Newtown, Superior Court, judicial district of Danbury,* Docket No. 322425, 18 CONN. L. RPTR. 463 (December 12, 1996) (Moraghan, J.), this court declines the invitation. The federal legislature has created an adequate remedy pursuant to 42 U.S.C. § 1983 which the plaintiffs pursue in the present case.

the equal protection clause of the fourteenth amendment to United States constitution." *Keogh v. Bridgeport*, 187 Conn. 53, 66, 444 A.D. 225 (1982).[5] "The Second Circuit stated the applicable rule of law: '[L]iability in the instant type of equal protection case should depend on proof that (1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Schnabel v. Tyler*, 230 Conn. 735, 762, 646 A.2d 152 (1994), quoting *LeClair v. Saunders*, 627 F.2d 606, 608 (2d Cir.1980); *Crowley v. Courville*. 76 F.3d 47, 52-53 (2d Cir.1996). "To sustain [the] equal protection claim . . . [the plaintiffs] must satisfy both prongs of the test stated above." *Zahra v. Town of Southold*, 48 F.3d 674,

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[5] The constitution of Connecticut, article first, § 20, as amended by article twenty-one of the amendments, provides: 'No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability." "In appropriate circumstances, we have interpreted the equal protection provisions of the state constitution differently than that contained in the federal constitution, particularly when the distinctive language of our constitution call for an independent construction." *Daly v. Delponte*, 225 Conn. 499, 513, 624 A.2d 876 (1993). The Connecticut Supreme Court has interpreted the clause differently in those circumstances where Connecticut recognizes a suspect class and the United Stated [sic] does not. *See Daley* [sic] *v. Delponte, supra*, 225 Conn. 499, 624 A.2d 876 (the court emphasized that it applies the strict scrutiny standard to cases involving discrimination based on physical and mental disabilities).

684 (2d Cir.1995). "The malice/badfaith standard should be scrupulously met when the discrimination does not involve classes or groups but individuals." *Schnabel v. Tyler, supra,* 230 Conn 763.

A. Mayor Guerra

To survive the motion to dismiss the plaintiffs must make a prima facie case demonstrating that Guerra acted in concert with or conspired with the other defendants to deny their application with a malicious or bad faith intent to injure the plaintiffs and that the plaintiffs, compared with others similarly situated, were selectively treated.

At trial the plaintiffs offered a copy of the transcript from the June 23, 1987 hearing to demonstrate that Guerra acted with malice. Guerra testified that he appeared before the Commission on that date to reiterate his political opposition to spot zoning after one of his constituents requested that he do so.[6] The plaintiffs argue

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[6] The Mayor made the following pertinent comments: "I'm here tonight because on you [sic] agenda gentlemen, I read that there are an application [sic] for a site plan review for zone changes to multi-family complexes. I'm here also to remind you, as I think you're all aware of, the City of West Haven has presently a moratorium which is in effect until the December 4 of this year which would be a year that this will be in effect. The purpose of this moratorium is two fold if you recall. The main purpose was that we wanted and we finally agreed after nine months of laboring that we would implement, I'm so sorry, develop a plan of development for the city of West Haven. A plan of development that has been missing in the City of West Haven for many years, therefore allowing spot zoning, indiscriminate housing, indiscriminate building that has to

that Guerra's appearance at the hearing and speech against spot zoning establishes a prima facie case of malice. "The mayor as the chief executive officer of the town was in duty bound to express to the public and to local administrative boards what he believed to be in the best interests of the community." *Schwartz v. Hamden*, 168 Conn. 8, 16, 357 A.2d 488 (1975). Accordingly, this court cannot infer that Guerra acted with malice on the facts presented by the plaintiff. The court finds that the plaintiffs have not succeeded in making a prima facie case of malice on the part of Guerra.

As to the claim that Guerra acted in concert with or conspired with the other defendants, the court concludes that the plaintiffs have offered no evidence to demonstrate this claim. Furthermore, the court cannot infer that Guerra conspired with or acted in concert with the other defendants merely because he spoke at the hearing prior to the plaintiffs' application. As discussed previously, Guerra, as mayor, was duty bound to speak for what he believed to be the best interest of West Haven. In light of this duty the court cannot infer that Guerra conspired with the other defendants. Accordingly, the court concludes that the plaintiffs have failed to demonstrate that

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cease. I think we can all agree that it is the finest thing that happened to the City of West Haven. The development of the plan of development . . . I'm here today once again to remind you that if we are to have a plan of development that would better the life of our individuals in the City of West Haven, improve the quality of life for everyone then we must, we must adhere to the law. There is, gentleman, one [sic] again a moratorium issued and in effect until December." (Exhibit I., p. 2.)

Guerra acted in concert with or conspired with the other defendants to injure the plaintiffs.

Further, the plaintiffs have failed to demonstrate that Guerra singled out the plaintiffs' application for selective treatment for two reasons. First, the evidence showed that there were other zone change applications seeking spot zoning before the commission that evening. At the opening of the hearing Guerra stated, "I'm here tonight because on your agenda gentlemen, I read that there are an application [sic] for a site plan review for zone changes to multi-family complexes." (Exhibit I, p. 2.) Second, "[w]e take judicial notice of the uniform practice in this county of mayors and other chief executives, especially when popularly elected, to become the principal proponents for legislative change." *Ghent v. Zoning Commission*, 220 Conn. 584, 588, 600 A.2d 1001 (1991). Faced with this language from our Supreme Court alone, the court cannot infer that just because Guerra spoke just prior to the Commission's hearing of the plaintiffs' application that he intended to single out the plaintiffs' application for disparate treatment. The court finds that the evidence shows that Guerra was merely fulfilling his duties as an elected executive.

Accordingly, the court holds that the plaintiffs have failed to make out a prima facie case of an equal protection violation against Guerra because the plaintiffs have not demonstrated that Guerra acted with malice or a bad faith intent to injure them, that he conspired with or acted in concert with the other defendants or that he singled out the plaintiffs for selective treatment.

B. Lewis and Saldibar

To survive the motion to dismiss the plaintiffs must make a prima facie case demonstrating that Lewis and Saldibar acted with a malicious or bad faith intent to injure the plaintiffs and that the plaintiffs, compared with others similarly situated, were selectively treated.

The plaintiffs seek to demonstrate that Lewis and Saldibar acted with malice toward them based on the court's rulings by Judges Schimelman and Flanagan. "In order for collateral estoppel to bar the relitigation of an issue in a later proceeding, the issue concerning which relitigation is sought to be estopped must be identical to the issue decided in the prior proceeding. To establish whether collateral estoppel applies, the court must determine what facts were necessarily determined in the first trial, and must then assess whether the [party] is attempting to relitigate those facts in the second proceeding . . . The issues involved in a zoning appeal are separate and distinct from those involved in a civil rights action under the federal statute . . . " *Wight v. Town of Stonington*, 43 Conn.App. 654, 659, 685 A.2d 686 (1996). In the present case, the court is not considering issues identical to those raised on the zoning appeals, instead the court is considering issues of malice, bad faith and selective treatment. Accordingly, the court concludes that the doctrine of collateral estoppel does not apply.

At trial the plaintiffs introduced audio and video tapes of the May 13, 1986 and the June 23, 1987 hearings before the commission in an effort to show that Lewis and Saidibar [sic] acted with malice. "The element of malice raises questions of improper or unjustifiable

motive." *Haxhi v. Moss*, 25 Conn.App. 16, 19, 591 A.2d 1275 (1991). The following comments took place at the May 13, 1986 hearing:

Lewis: This guy [George Thomas] made plans for Silverbrook instead of what he called for and pool hall [inaudible]. We gave this guy everything. Now he comes with this s**t. He's a shrewdy [sic].

Saidibar [sic]: I'd like to have this guy come back when he's ready.

Lewis: Deny with prejudice.

Planner: You got to listen to him.

Saldibar: All right.

Lewis: You said we got to listen to him. We do. We listen to him. And that's all there is to it.

Saldibar: Fine. Let's go.

At the June 23, 1987, the following colloquy occurred after the plaintiffs' application was called.

Lewis: Why are we hearing this?

Saldibar: Which one?

Lewis: The first one. It was decided twice.

Saldibar: We got to let him come up.

Lewis: Why?

Saldibar: He's got changes on it I assume. He's on the agenda.

Lewis: He was denied twice. Where is the corporation counsel?

(Exhibit I, p. 3.)

The corporation counsel rose and informed the Commission of the court's, Schimelman, J., decision. After hearing the substance of the decision the discussion continued in heated tones. Counsel for the plaintiffs then requested that Lewis and Saldibar recuse themselves from hearing and voting on the application in light of Judge Schimelman's decision. Saldibar summarily denied the request stating, "Your request is considered and denied." At this point in the hearing the tapes indicate an attitude of animosity and disdain on the part of Commissioners Lewis and Saldibar for George Thomas. The court concludes that the conversations and comments revealed on these tapes, viewed in the light most favorable to the plaintiffs, demonstrates that Lewis and Saldibar treated the plaintiff George Thomas with animosity and disdain. Accordingly, the court finds that the plaintiffs have demonstrated that the Lewis and Saldibar acted with malice in considering their application of June 23, 1987.

The plaintiffs further argue that they were, when compared with others similarly situated, selectively treated. To support their claim, the plaintiffs submitted evidence concerning numerous zone change applications between the months of January 14, 1986, and December 4, 1986, inclusive. In particular the plaintiffs refer the court to the following zone change applications:

1. Z86.2 – Change of zone from R3-1 to C-5; granted.

2. Z86.9 – Change of zone R3-2 to R-5; postponed.

3. Z86.14 – Change of zone from R3-2 to C4; approved.

4. Z86.21 – Change of zone from R2 to R5; tabled.

5. Z86.22 – Change of zone from R2 to R5; granted.

6. Z86.27 – Change of zone from M2, R3-1 to R5; tabled.

7. Z86.28 – Change from R3-1 to C3; tabled.

8. Z86.38 – Change of zone from R3-1 to C-3; tabled.

9. Z86.31 – Change of zone from R3-1 to C5; tabled.

10. Z86.30 – Change of zone from C1 to C5; tabled.

11. Z86.24 – Change of zone from SBD to C5; tabled.

12. Z86.25 – Change of zone from SBD-1 to R5; tabled.

13. Z86.21 – Change of zone from R2 to R5; modified to R2 and then granted.

14. Z86.27 – Change of zone from M2, R3-1 to R5; granted.

15. Z86.28 – Change of zone from R3-1 to C-3; tabled.

16. Z86.31 – Change of zone from R3-1 to C5; granted.

17. Z86.30 – Change of zone from C1 to C5; granted.

18. Z87.2 – Change of zone from R2 to M2; continued.

19. Z87.1 – Change of zone from R3-1 to R3-2; denied without prejudice.

20. Z87.2 – Change of zone from R2 to M2; tabled.

21. Z87.3 – Change of zone from PF to R5; granted.

The plaintiffs contend that all of these applications were similarly situated to their own; yet, the commission did not require a site plan for the other applications and the other applications received different treatment. The court concludes that merely because the applications were before the board on a request for a zone change does not demonstrate that the various applicants were similarly situated for purposes of a claim of equal protection. For instance, the plaintiffs sought a change of zone from C-2 on one parcel and R3-2 on the other to R-5 on both parcels. None of the applications referred to by the plaintiffs involved a similar zone change request from a commercial/residential zone to a residential zone. Further, the applications requesting changes to R5 were previously zoned residential except for one, Z86.25, which

was zoned S.D.D.[7] In addition, during the May 13, 1986, hearing Roark, the city planner, had the following colloquy with Jessie Hamlin of Hamlin Associates Architects, the architectural firm hired by the plaintiffs:

The court concludes that the plaintiffs have failed to demonstrate that there were any other nonbinding zone change applications based on a conceptual plan before the board during the pertinent time period.

Moreover, even if the court assumes, arguendo, that each application was similarly situated, the court holds that the plaintiffs have failed to establish that the commission treated their application selectively. The court finds that the plaintiffs' evidence does not demonstrate that the commission did not require a site plan from the other applicants during the time that procedure was in place.[8] Indeed, the evidence submitted is silent as to

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[7] The plaintiffs have not indicated what this abbreviation means.

Roark: You have submitted your change of zone application. My question is have you submitted a site plan application?

Hamlin: No we haven't

Roark: Okay, so you're basically seeking a zone change with a conceptual plan that's basically nonbinding.

Hamlin: Exactly.

(Exhibit E, p. 11.)

[8] At trial Lewis and Saldibar testified that the commission's procedure was to require a site plan with all zone change applications. The commission discontinued this procedural requirement after the court, Schimelman, J., and the corporation counsel for West Haven informed them that a site plan was not required by the regulations.

whether a site plan was submitted or required for the other applications. As to the second denial, the court concludes that the defendants have not demonstrated that the commission's denial of the application was based on anything other than the commission's exercise of its discretion and not on the alleged malice of Lewis and Saldibar.[9] *See Crowley v. Courville*, 76 F.3d 47, 53 (2d. Cir.1996). Accordingly, based on the evidence adduced by the plaintiffs, the court concludes that the plaintiffs have not met their burden of demonstrating that they were either similarly situated to others or selectively treated.

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[9] At the Regular Meeting of the commission on June 23, 1987, the commission turned to the plaintiffs' application. Prior to considering the application Lewis and Saldibar indicated that they would not take part in the vote. Saldibar turned the chair over to secretary Withington. Alternate Prindle observed in pertinent part: "I don't feel that the change would benefit the area. They're trying to revitalize it as a commercial area and you could see from the material . . . that that area is being brought back to a commercial use and I don't see where this zone change would be appropriate for that land use . . . " (Defendants' Exhibit 105, p. 2.) Interim city planner Miller stated his position as follows: "My feeling, my feeling is that the City is in the process of a comprehensive preparation or plan of development and rezoning and this represents one parcel among thousands and I think that it would be appropriate to wait until the consultants reports are in because it is conceivable that he may recommend something in a totally different direction . . . " (Defendants' Exhibit 105, p. 3.) A motion was then made to deny the application and the commissioners voted to deny the application. The plaintiffs failed to produce evidence from the commissioners that the actions of Lewis and Saldibar affected their decision.

Municipal Defendants – West Haven and The Commission

"A municipality may not be held liable in an action under 42 U.S.C. § 1983 for actions alleged to be unconstitutional by its employees below the policymaking level solely on the basis of respondeat superior . . . To hold a municipality liable in an [§ 1983] action, a plaintiff is required to plead and prove three elements: (1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right . . . We have previously ruled that a municipal policy may be inferred from the informal acts or omissions of supervisory municipal officers." (Citations omitted; internal quotation marks omitted.) *Zahra v. Town of Southold*, 48 F.3d 674, 685 (2d. Cir.1995).

In their amended complaint the plaintiffs allege that "the defendants have deprived the plaintiffs of rights secured by the fifth and fourteenth amendments to the Constitution of United States, in the defendants have deprived [the] plaintiffs of the use of their property without just compensation therefor by denying them equal protection under the law . . . " (Amended Complaint, third count.)

A review of the evidence adduced at trial reveals that the plaintiffs have not demonstrated that they were denied a constitutional right by the municipal defendants. The court, on two different occasions, determined that the plaintiffs could not establish that they had a constitutional right to due process as a matter of law. *See Thomas v. City of West Haven, Superior Court, judicial district of New Haven at New Haven*, Docket No. 284555, 17

CONN. L. RPTR. 425 (July 24, 1996) (Booth, J.) (the court granted a motion to strike the state due process claim adopting the reasoning set forth in *Kelley Property Development, Inc. v. Lebanon, supra,* 226 Conn. 314, 627 A.2d 909); *Thomas v. City of West Haven, Superior Court, judicial district of New Haven at New Haven,* Docket No. 284555 (August 24, 1995) (Gordon, J.) (the court found that the plaintiffs did not have a "clear entitlement to the property interest sought). This court adopts the reasoning in those two decisions to the extent that the decisions discuss the plaintiffs' constitutional right to a zone change. Furthermore, to the extent that the plaintiffs allege that they have been denied equal protection by the municipal defendants, the court concludes that when the evidence is viewed in the light most favorable to the plaintiffs it fails to demonstrate the denial of equal protection or a [sic] unconstitutional taking.

Accordingly, for the forgoing reasons discussed herein, addressed to the individual groups of defendants, the court grants the defendants' motion to dismiss pursuant to Practice Book § 302 and enters judgement in their favor.

George THOMAS, et al,

v.

CITY OF WEST HAVEN, et al.

CV89-0284555-S.

Superior Court of Connecticut, Judicial District of New Haven at New Haven.

Aug. 23, 1995.

MEMORANDUM OF DECISION RE: MOTIONS FOR SUMMARY JUDGMENT

GORDON, Judge.

On May 15, 1989, the plaintiffs, George Thomas, Barbara Thomas and John Finnel, filed a two-count complaint against the defendants, the City of West Haven, the Planning and Zoning Commission of the City of West Haven (Commission), and the individual members of the Commission.[1] This complaint was revised on October 3, 1989, on October 19, 1989, and amended on January 14, 1994. The plaintiffs allege (1) a taking of the plaintiffs' land without due process in violation of article first of the Connecticut Constitution and the fifth and fourteenth amendments of the United States Constitution, and (2) a denial of due process of law and a denial of equal protection in violation of article first of the Connecticut Constitution and the fifth and fourteenth amendments of the United States Constitution, redress for which is provided

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[1] The individual members of the Commission, named as separate defendants, are David Saldibar, Donald Lewis, Donald Voss, Steven Prindle, Francis Withington, Allen Alderman, Joseph Celentano and the Mayor of West Haven, the Honorable Azelio M. Guerra.

by 42 U.S.C. § 1983. The defendants filed an amended answer and/or special defense to the plaintiffs' amended complaint on May 18, 1993,[2] June 28, 1993 and May 16, 1994. All parties have filed competing motions for summary judgment.

The facts alleged in the revised complaint are as follows. The plaintiffs are owners of two contiguous parcels of land located at 770 Campbell Avenue, New Haven, Connecticut. On April 1, 1986, the plaintiffs applied to the Commission for a change of zone classification of the plaintiffs' property from C-2 (commercial – local service) on one parcel and R3-2 (residential – two family) on the other to R-5 (apartment building) on both parcels to allow for conversion of the existing building on the property to residential condominium units. After conducting a public hearing on the plaintiffs' application on May 13, 1986, the Commission denied the plaintiffs' application on May 20, 1986.

George Thomas appealed to the Superior Court, pursuant to General Statutes § 8-8, from the denial of his application for a zone change. The Superior Court, Schimmelman, J., sustained Thomas's appeal on the ground that, in denying the zone change application, the Commission acted illegally, arbitrarily and in abuse of

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[2] On May 18, 1993, the defendants filed an amended answer and special defense to the plaintiffs' revised complaint adding the special defense of 'qualified immunity'. Nevertheless, "where a party fails to brief an issue . . . it is deemed abandoned." *DeMilo v. West Haven*, 189 Conn. 671, 682, 458 A.2d 362 (1983). In the present case, the defendants failed to brief the issue of qualified immunity as raised in their special defense.

discretion in that its decision was predetermined and based upon a personal prejudice against Thomas.

By application dated May 9, 1986, the plaintiffs also sought a variance of the existing zone classifications of their property to allow a mixed residential and commercial use on both parcels and to allow a three story building on a portion of the property. The Zoning Board of Appeals (ZBA) denied the plaintiffs' variance application after the defendant, Mayor Azelio Guerra, attended the hearing thereon and communicated his opposition to the ZBA.

On June 16, 1986, the plaintiffs, in the name of T.F. Builders, applied for a change of zone classification of their property from C-2 and R3-2 to CM (mixed – commercial and multi-family) to allow for conversion of the building on the property to residential and commercial condominium units. After a public hearing on July 14, 1986, the Commission denied the zone change application on July 22, 1986.

Subsequent to the denial of the plaintiffs' first zone change application, the Commission amended its regulations to include a moratorium on zone changes which would permit the construction of multi-family/condominium housing. The moratorium became effective September 1, 1986, and was continued until December 1, 1987, or until such time as a new comprehensive plan for the City was adopted.[3]

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[3] The plaintiffs allege that the city officials and agents of the Commission stated publicly that the moratorium would apply only to applications filed after the effective date of the moratorium. *See* plaintiffs' complaint, ¶ 23.

After the Superior Court sustained the appeal, the plaintiffs' April 1, 1986 zone change application was reactivated at the request of the plaintiffs. On June 23, 1987, the Commission reconsidered the plaintiffs' application at a public hearing. At the hearing, the defendant Guerra spoke in opposition to the plaintiffs' application. On July 1, 1987, the plaintiffs were notified that the Commission had again denied their zone change application.[4]

The plaintiffs appealed to the Superior Court, pursuant to General Statutes § 8-8, from the second denial of their zone change application. The Superior Court, Flanagan, J., sustained the plaintiffs' appeal on the ground that the Commission acted with predisposition and predetermination in denying the plaintiffs' application. In reaching its conclusion, the court found that certain Commission members, in particular Saldibar and Lewis, created an atmosphere of hostility toward Thomas, preventing the plaintiffs from getting the fair hearing to which they were entitled.

"In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact, but rather to determine whether any such issues exist." *Nolan v. Borkowski*, 206 Conn. 495, 500, 538 A.2d 1031 (1988). Summary judgment "shall be rendered forthwith

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[4] The plaintiffs allege that on June 23, 1987, immediately after the public hearing, the Commission granted an application for a zone change for another parcel from M-1 (industrial) to R-4 (multi-family) in order to permit construction of residential condominiums. The plaintiffs also allege that on July 14, 1987, the Commission granted an application for a zone change on another parcel to permit multi-family use for condominium development. *See* plaintiffs' complaint, ¶¶ 26-27.

if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the party is entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Suarez v. Dickmont Plastics Corp.*, 229 Conn. 105, 639 A.2d 507 (1994).

The moving party "has the burden of showing the absence of any genuine issue as to all material facts which, under the applicable principles of substantive law, entitle him to a judgment as a matter of law." (Internal quotation marks omitted.) *Id.* "In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party . . . and he is given the benefit of all favorable inferences that can be drawn." *Catz v. Rubenstein*, 201 Conn. 39, 49, 513 A.2d 98 (1986).

"The test is whether a party would be entitled to a directed verdict on the same facts." *Suarez v. Dickmont Plastics Corp., supra*, 220 Conn. 105-06. " 'A summary disposition . . . should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party.' " *Whitney Avenue Corp. v. Heritage Canal Development Associates*, 33 Conn.App. 563, 566, 636 A.2d 1377 (1994), quoting *Batick v. Seymour*, 186 Conn. 632, 647, 443 A.2d 471 (1982).

"A motion for summary judgment shall be supported by such documents as may be appropriate, including but not limited to affidavits, certified testimony of transcripts under oath, disclosures, written admissions and the like. . . . " *Aetna Casualty & Surety Co. v. Jones*, 220 Conn. 285, 291 n. 7, 596 A.2d 414 (1991), quoting Practice Book § 380.

The plaintiffs argue that they are entitled to summary judgment on the grounds that they have been denied due process of law and have been denied equal protection under the law, and thus should prevail under 42 U.S.C. § 1983.

The defendants argue that the plaintiffs have been denied neither due process of the law nor equal protection under the law. They also assert there has been no "takers" of the plaintiff's property.

Section 1983 of 42 U.S.C. provides, in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

"Section 1983 of 42 U.S.C. is available to redress deprivations under color of state law of rights, privileges and immunities secured by federal statutes as well as by the constitution." *Fetterman v. University of Connecticut*, 192 Conn. 539, 549, 473 A.2d 1176 (1984), citing *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1979). "[T]he touchstone of [a] § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution [sic]. . . . " (Citations omitted; internal quotation marks omitted.) *Tedesco v. Stamford*, 215 Conn. 450, 456, 576 A.2d 1273 (1990). The United States Constitution

provides that the "State [shall not] deprive any person of life, liberty, or property, without due process of law. . . . " U.S. Const. amend. XIV, 1.

State courts have concurrent jurisdiction with federal courts with regard to a 42 U.S.C. § 1983 cause of action. *Red Maple Properties v. Zoning Commission,* 222 Conn. 730, 739 n. 7, 610 A.2d 1238 (1992). Thus, "[t]he decisions of the federal circuit in which a state court is located are entitled to great weight in the interpretation of a federal statute. This is particularly true in 42 U.S.C. cases. . . . " *Id.*

As to the first count of the complaint, which alleges a taking, it appears that the plaintiffs, who have not briefed this issue, concede that summary judgment may enter in favor of the defendants on this claim.

The due process claim asserted by the plaintiffs, is governed by *RRI Realty Corporation v. Incorporated Village of Southhampton,* 870 F.2d 911 (2d Cir.1989); *Red Maple Properties v. Zoning Commission,* 222 Conn. 730 (1992); and *Carr v. Bridgewater,* 224 Conn. 44 (1992). In order to proceed on a due process claim one must have a property interest. In cases like this one, a property right must be shown by "clear entitlement" to the zoning action sought. The plaintiff, who sought a zone change classification cannot meet this test, as the zoning authority retained wide discretion in regard to the zone classification.

On the other hand, the plaintiffs' equal protection claim is not subject to this entitlement test. Rather, the plaintiffs' claim is governed by cases which deal with selective treatment of persons similarly situated. While the complaint makes no claim of selective "enforcement",

it may be analogized to such cases, because at its heart is the allegation of being singled out for different treatment by the zoning authority.

In *LeClaire v. Saunders*, 627 F.2d 606, 608, the plaintiff claimed selective enforcement of a lawful state regulation based on an invidious purpose. The plaintiffs fell into no suspect class. The Second Circuit stated the rule of law in such cases:

> "Liability in the instant typed equal protection case should depend on proof that 1) the person, compared with others similarly situated, was selectively treated; and 2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Id.*, 609-610.

The question of whether the defendants here violated this rule of law is fact-bound and must be resolved by a jury.

As the plaintiffs have abandoned their first count alleging a taking, summary judgment on that count is granted in favor of the defendants.

As to the second count, both the plaintiffs' and defendants' motions for summary judgment are denied. While both due process and equal protection claims are made in that count, only the equal protection claim should be presented to the jury, as the due process claim fails as a matter of law. As the pleadings are not organized so that this outcome can be ordered here, the trial

judge will need to make appropriate rulings at the time of the trial.

Memorandum of Decision, Flanagan, J.,
June 22, 1988

NO. 26 13 62	)	SUPERIOR COURT
GEORGE THOMAS, ET AL.	)	JUDICIAL DISTRICT OF NEW HAVEN
V.	)	JUNE 22, 1988
PLANNING AND ZONING COMMISSION OF THE CITY OF WEST HAVEN	)	

MEMORANDUM OF DECISION

(Filed Jun 23, 1988)

The instant matter is an appeal from the denial of an application filed by the plaintiffs for a change of zone classification of their property located at 770 Campbell Avenue, West Haven, Connecticut, from C-2 (commercial) and R3-2 (residential – two family) to R-5 (apartment building) to permit conversion of the building on the property to residential condominium units.

Historically it should be noted that an earlier application for the same change was denied. An appeal from said denial was sustained on the grounds of predetermination and personal bias against the named plaintiffs. The Commission, on remand, held a second public hearing and again voted to deny the application from which the present appeal has been taken.

Testimony was taken on June 20, 1988 which established that the plaintiffs are the owners of the involved parcel of land and as such are aggrieved persons. § 8-8,

Conn. Gen. Stat.; *O'Connor v. ZBA,* 140 Conn. 65. It is found that the plaintiffs have satisfied the requirement of aggrievement.

The transcript of the public hearing indicates that the mayor spoke in opposition to the plaintiffs' application in terms of a moratorium which post dated said application.

The record indicates that Commissioner Lewis questioned why the commission was "hearing this. . . . It was denied twice" to which the chairman responded "We got to let him come up."

The applicants' attorney requested that Mr. Lewis and the Chairman disqualify themselves in light of the earlier appeal in which the court (Schimelman, J.) noted "the record reflects a predetermination on the part of the commission based upon a desire for a site plan where none was required and a *personal prejudice against the plaintiff.*" (emphasis added). The Chairman (Saldibar) summarily responded " . . . Your request is considered and denied."

Thereafter there followed a colloquy between Messers. Saldibar and Lewis and the corporation counsel in which the Commission members appeared to manifest ignorance of Judge Schimelman's holding. The corporation counsel then recommended that two alternates be appointed. Messers. Saldibar and Lewis apparently were unwilling at this point to accept the suggestion of the town attorney and directed further inquiry to applicants' attorney:

"CHAIRMAN SALDIBAR – 'Okay then as Chairman, excuse me Counselor, two things I do, would like to know

if we were wrong I would like to know what Commissioner Lewis did wrong and I certainly would like to know what I did wrong.'

COMMISSIONER LEWIS – 'What we did wrong.'

CHAIRMAN SALDIBAR – 'Let him answer seeing he's making the complaint.'

SPEAKER #1 – 'I'm not making the complaint.'

CHAIRMAN SALDIBAR – 'Well who ever is making the complaint.'

SPEAKER #1 – 'I would agree with the decision of the Superior Court.'

CHAIRMAN SALDIBAR – 'Well could you tell us what is wrong.'

SPEAKER #1 – 'I'll read it to you, if you'd like.' "

Applicants' attorney then read Judge Schimelman's opinion into the record.

Further colloquy ensued.

"SPEAKER #1 – 'On page two of the decision in the last paragraph the court holds with respect to the first zone change request . . . inaudible . . . the plaintiff claims that the defendants decision was predetermined by the desire to appease the Mayor concerning his moratorium policy and further . . . inaudible . . . predetermination . . . inaudible . . . lack of a fair and impartial hearing caused by misunderstanding of the requirement of the application and personal predudice [sic] against the plaintiff.'

COMMISSIONER LEWIS: 'Personal?'

CHAIRMAN SALDIBAR: 'Let him finish Don. Let him finish.'

SPEAKER #1: 'The court then goes on to hold.'

COMMISSIONER LEWIS: 'You the guy?'

CHAIRMAN SALDIBAR: 'Mr. Lewis.'

COMMISSIONER LEWIS: 'Is this the guy right here- . . . inaudible . . . '

CHAIRMAN SALDIBAR: 'Hey, wait a minute gentlemen.'

COMMISSIONER LEWIS: 'I'd like to know what the hell I did.'

CHAIRMAN SALDIBAR: 'Don, Don, take it easy.'

COMMISSIONER LEWIS: ' . . . inaudible . . . '

CHAIRMAN SALDIBAR: 'You sit down. Wait a minute. Let him finish. He can stare all he wants. Finish.' "

"After the corporation counsel advised the two Commission members to disqualify themselves, Mr. Lewis got up to leave."

"CHAIRMAN SALDIBAR: 'Well, wait, wait, that don't mean, you don't have to leave.'

COMMISSIONER LEWIS: 'I don't want to hear it.' "

The atmosphere created by the foregoing was one of hostility in which the applicant was unable to obtain the fair and reasonable hearing to which he was entitled. *Marmah, Inc. v. Greenwich,* 176 Conn. 116, 118, 119.

"Section 8-11 Conn. Gen. Stat. forbids a member of a zoning commission from participating in any matter in

which he has a personal interest in the outcome. A personal interest has been defined as an interest in either the subject matter or a relationship with the parties before the zoning authority impairing the impartiality expected to characterize each member of the zoning authority. *A personal interest can take the form* of favoritism towards one party or *hostility towards the opposing party; it is a personal bias or prejudice which imperils the open-mindedness and sense of fairness which a zoning official in our state is required to possess. . . .* (citations omitted)." (emphasis added) *Thorne v. Zoning Commission,* 178 Conn. 198, 204-205.

"The problem to which the statute speaks lies in the 'creation of a situation tending to weaken public confidence and to undermine the sense of security of individual rights which the property owner must feel assured will always exist in the exercise of zoning power. *Daly v. Town Plan & Zoning Commission,* supra." *Thorne v. Zoning Commission,* supra, Ft. Note 2.

The only reasons noted by the Commission as the grounds for a denial of the application were (a) the area was being revitalized as a commercial area and (b) that any zone change should await a new "plan of development." Speculation as to the future is not an appropriate basis for denying an application for a zone change. The issue is whether the proposed change is in accord with the comprehensive plan. *First Hartford Realty Corporation v. Plan & Zoning Commission of Bloomfield,* 165 Conn. 533, 541. "The comprehensive plan is to be found in the scheme of the zoning regulations themselves" as distinguished from the plan of a consultant. Id. at P. 542.

The applicant is entitled to have his request considered against an existing plan.

The record with respect to the conclusion that the area was being revitalized as a commercial area is lacking in conviction.

The scope of judicial review in matters of this type is limited. This court does not retry the case. *Burnham v. Planning and Zoning Commission,* 189 Conn. 261, 266. "Courts are not to substitute their judgment for that of the board . . . and decisions of local boards will not be disturbed so long as honest judgment has been reasonably and fairly exercised after a full hearing. . . . 'Upon appeal, the trial court reviews the record before the board to determine whether it has acted fairly or with proper motives or upon valid reasons.' " (Citations omitted) *Whittaker v. Zoning Board of Appeals,* 179 Conn. 650, 654 (1980); *Torsiello v. Zoning Board of Appeals,* 3 CA 47, 49.

"Courts should not lightly interfere in either the administrative or legislative determinations of a duly constituted zoning commission." But where as here the cumulative effect of the foregoing is such as to compel the conclusion that the defendant Commission acted with predisposition and predetermination its actions were "capricious, unreasonable and illegal and cannot be allowed to stand." *Marmah, Inc. v. Greenwich,* supra p. 123-124.

The appeal is sustained.

/s/ Flanagan
John C. Flanagan, Judge

Memorandum of Decision, Schimelman, J.,
January 9, 1987

NO. 248004

SUPERIOR COURT

GEORGE THOMAS

v.

PLANNING & ZONING
COMMISSION OF WEST HAVEN

NO. 249820	:	
T. F. BUILDERS	:	JUDICIAL DISTRICT
v.	:	OF NEW HAVEN
PLANNING & ZONING COMMISSION OF WEST HAVEN	:	JANUARY 9, 1987

MEMORANDUM OF DECISION

(Filed Jan. 12, 1987)

These are consolidated appeals from the denial of two separate change of zone applications.

By complaint dated May 30, 1986, plaintiff, George Thomas, appeals from the denial of a change of zone classification of two parcels of property located at 770 Campbell Avenue, West Haven, Connecticut, from C-2 (commercial – local service) and R 3-2 (residential-two family) to R5 (apartment building) to permit residential condominium units. After a public hearing on May 13, 1986, plaintiff's application, in the name of T.F. Builders, was denied with prejudice on May 20, 1986.

By complaint dated August 6, 1986, plaintiff, T.F. Builders, appeals from the denial of a change of zone classification concerning the same property from C2 and R3-2 to CM (mixed-commercial and multi family) to permit condominium units, this application being subsequent to denial of the first zone change request. After a public hearing on July 14, 1986, plaintiff's application was denied on July 22, 1986.

By motion dated November 6, 1986, plaintiff in these appeals sought to introduce certified copies of newspaper articles as additional evidence purporting to show that defendant's denials were to appease the Mayor of West Haven who sought a moratorium on condominiums. After hearing, this court denied the motion, holding that these newspaper articles were hearsay, not the best evidence and of little, if any, evidential value.

At the hearing concerning these appeals, plaintiff, George Thomas, testified concerning aggrievement and the Court finds that plaintiffs have standing.

With respect to the first zone change request and resulting appeal, plaintiff claims defendant's decision was predetermined by a desire to appease the Mayor concerning his moratorium policy and further claim of predetermination due to the lack of a fair and impartial hearing caused by misunderstanding of the requirements for the application and personal prejudice against plaintiff.

A review of the record reveals no evidence that defendant's decision was in any way influenced by the claimed moratorium policy of the mayor nor was any proper evidence admitted to supplement the record to

prove this allegation. With respect to the claim of predetermination due to the lack of a fair and impartial hearing, the Court finds that plaintiff has sustained his burden of proof as evidenced by the record.

Exhibit G, *Remarks at Planning and Zoning Commission Meeting of May 13, 1986,* shows that a good deal of the public hearing concerned a misperception that plaintiff was obligated to file a site plan, contrary to Section 72-1 of the City of West Haven Planning and Zoning Regulations, which indicates a site plan was not required. *See*: Exhibit B, p. 88. Even after plaintiff's representative and the Town's planner made that known to defendant, the issue of the site plan remained of paramount importance and was given as one of three reasons for the application's rejection.

A review of Exhibit G indicates the attitude of the commission. The Chairman stated " . . . I don't want the other guys messing until he comes back with proper documentation. Don't even waste time with it." Exhibit G, p. 12. " . . . I don't want to waste time going through this until they come back with a proper . . . " Exhibit G, p. 13. "I'd like to have this guy come back when he's ready." Exhibit G, p. 15. Commissioner Lewis, after a colloquy with plaintiff's representative concerning the claimed requirement of a site plan and the ability of plaintiff to place more units on the parcel after approval of a zone change, since a site plan had not been filed, also showed his predisposition toward the application, stating "This guy . . . inaudible . . . fall for a pool hall. We gave this guy everything. He's a shrewdy." Exhibit G, p. 15. After the Town's planner indicated a site plan was not necessary, Commissioner Lewis opined "You say, we got to listen to

him, we do and that's all there is to it." Exhibit G, p. 15. It was Commissioner Lewis who made the motion to deny plaintiff's application with prejudice giving as one of his three reasons " . . . No seal was on the plan and the proposal didn't have a valid Site Plan." Exhibit E, p. 2.

While acknowledging the liberal discretion given to planning and zoning commissions, particularly with respect to the legislative function of a zone change, as more fully set forth in *Summ v. Zoning Commission* 150 Conn. 79, 89 (1962), this Court also recognizes that " . . . a court cannot take the view in every case that the discretion exercised by the local zoning authority must not be disturbed, for if it did the right of appeal would be empty." *Suffield Heights Corporation v. Town Planning Commission of the Town of Manchester,* 144 Conn. 425, 428 (1957). Whether the commission acted with an open mind is a question of fact permitting consideration of circumstantial evidence. *Pecora v. Zoning Commission,* 145 Conn. 435, 446 (1958). Where the required hearing shows that " . . . the commission . . . has not acted fairly, with proper motives and upon valid reasons . . . " the commission's decision cannot be allowed to stand. *Kavanewsky v. Zoning Board of Appeals,* 160 Conn. 397, 403 (1971). A commission's action when exercising zoning decisions " . . . should command the highest public confidence. . . . Anything which tends to weaken public confidence and to undermine the sense of security of individual rights which a citizen is entitled to feel is against public policy." *Mills v. Town Planning and Zoning Commission,* 144 Conn. 493, 499 (1957).

To permit this denial to stand in view of the commission's conduct would be to deny plaintiff due process and

make the hearing requirement a hollow one. The record reflects a predetermination on the part of the commission based upon a desire for a site plan where none was required and a personal prejudice against plaintiff. Accordingly, the action of defendant is found to be illegal and the appeal is sustained. In view of this conclusion, the court does not address other issues plaintiff raises in this first appeal.

Plaintiff's second application for change of zone to CM and appeal therefrom raises the same predetermination issues as well as the claim that the first application prejudiced plaintiff, since defendant's decision was colored by the first application and denial thereof. A review of the record in this second appeal shows no predetermination, no evidence of any unfairness at the hearing nor any indication that the first application played any significant part in denial of the second application. *See*: Exhibit F, *Testimony Taken at the Planning and Zoning Commission Meeting of July 14, 1986.*

Plaintiff further alleges that defendant's denial of the application was contrary to the evidence and the law. "The credibility of the witnesses and the determination of issues of fact are matters solely within the province of the agency. (citations). The question is not whether the trial court would have reached the same conclusion, but whether the record before the agency supports the decision reached. (citation)" *Calandro v. Zoning Commission,* 176 Conn. 439, 440 (1979). The reason of nonconformity with the area was given by the commission in rejecting the application for a CM zone, which reason is clearly supported by the record and in conformance with Connecticut General Statutes Section 8-2.

Plaintiff claims that the denial of this application results in the taking of property without just compensation. "There is nothing arbitrary or confiscatory in a zoning commission's leaving property in its previous classification by its denial, on reasonable grounds, of an application for a change." *Zygmont v. Planning and Zoning Commission*, 152 Conn. 550, 556 (1965).

Since plaintiff has failed to show that defendant acted illegally and since the record in this second appeal indicates defendant has reasonably and fairly exercised its honest judgment that the zone change request should be denied, this appeal is dismissed.

/s/ Schimelman
Schimelman, J.

U.S. CONST. amend. XIV, § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*

* * *

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21 – CIVIL RIGHTS
SUBCHAPTER I – GENERALLY

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

WEST'S CONNECTICUT GENERAL STATUTES UNANNOTATED TITLE 8. ZONING, PLANNING, HOUSING, ECONOMIC AND COMMUNITY DEVELOPMENT AND HUMAN RESOURCES CHAPTER 124. ZONING

Current through Gen.St., Rev. to 1-1-99

§ 8-2. Regulations

(a) The zoning commission of each city, town or borough is authorized to regulate, within the limits of such municipality, the height, number of stories and size of buildings and other structures; the percentage of the area of the lot that may be occupied; the size of yards, courts and other open spaces; the density of population and the location and use of buildings, structures and land for trade, industry, residence or other purposes, including water-dependent uses as defined in section 22a-93, and the height, size and location of advertising signs and billboards. Such bulk regulations may allow for cluster development as defined in section 8-18. Such zoning commission may divide the municipality into districts of such number, shape and area as may be best suited to carry out the purposes of this chapter; and, within such districts, it may regulate the erection, construction, reconstruction, alteration or use of buildings or structures and the use of land. All such regulations shall be uniform for each class or kind of buildings, structures or use of land throughout each district, but the regulations in one district may differ from those in another district, and may provide that certain classes or kinds of buildings, structures or uses of land are permitted only after obtaining a special permit or special exception from a zoning commission, planning commission, combined planning and zoning commission

or zoning board of appeals, whichever commission or board the regulations may, notwithstanding any special act to the contrary, designate, subject to standards set forth in the regulations and to conditions necessary to protect the public health, safety, convenience and property values. Such regulations shall be made in accordance with a comprehensive plan and in adopting such regulations the commission shall consider the plan of conservation and development prepared under section 8-23. Such regulations shall be designed to lessen congestion in the streets; to secure safety from fire, panic, flood and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population and to facilitate the adequate provision for transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration as to the character of the district and its peculiar suitability for particular uses and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality. Such regulations may, to the extent consistent with soil types, terrain, infrastructure capacity and the plan of conservation and development for the community, provide for cluster development, as defined in section 8-18, in residential zones. Such regulations shall also encourage the development of housing opportunities, including opportunities for multifamily dwellings, consistent with soil types, terrain and infrastructure capacity, for all residents of the municipality and the planning region in which the municipality is located, as designated by the Secretary of the Office of Policy and

Management under section 16a-4a. Such regulations shall also promote housing choice and economic diversity in housing, including housing for both low and moderate income households, and shall encourage the development of housing which will meet the housing needs identified in the housing plan prepared pursuant to section 8-37t and in the housing component and the other components of the state plan of conservation and development prepared pursuant to section 16a-26. Zoning regulations shall be made with reasonable consideration for their impact on agriculture. Zoning regulations may be made with reasonable consideration for the protection of historic factors and shall be made with reasonable consideration for the protection of existing and potential public surface and ground drinking water supplies. On and after July 1, 1985, the regulations shall provide that proper provision be made for soil erosion and sediment control pursuant to section 22a-329. Such regulations may also encourage energy-efficient patterns of development, the use of solar and other renewable forms of energy, and energy conservation. The regulations may also provide for incentives for developers who use passive solar energy techniques, as defined in subsection (b) of section 8-25, in planning a residential subdivision development. The incentives may include, but not be limited to, cluster development, higher density development and performance standards for roads, sidewalks and underground facilities in the subdivision. Such regulations may provide for a municipal system for the creation of development rights and the permanent transfer of such development rights, which may include a system for the variance of density limits in connection with any such

transfer. Such regulations may also provide for notice requirements in addition to those required by this chapter. Such regulations may provide for conditions on operations to collect spring water or well water, as defined in section 21a-150, including the time, place and manner of such operations. No such regulations shall prohibit the operation of any family day care home or group day care home in a residential zone. Such regulations shall not impose conditions and requirements on manufactured homes having as their narrowest dimension twenty-two feet or more and built in accordance with federal manufactured home construction and safety standards or on lots containing such manufactured homes which are substantially different from conditions and requirements imposed on single-family dwellings and lots containing single-family dwellings. Such regulations shall not impose conditions and requirements on developments to be occupied by manufactured homes having as their narrowest dimension twenty-two feet or more and built in accordance with federal manufactured home construction and safety standards which are substantially different from conditions and requirements imposed on multifamily dwellings, lots containing multifamily dwellings, cluster developments or planned unit developments. Such regulations shall not prohibit the continuance of any nonconforming use, building or structure existing at the time of the adoption of such regulations. Such regulations shall not provide for the termination of any nonconforming use solely as a result of nonuse for a specified period of time without regard to the intent of the property owner to maintain that use. Any city, town or borough which adopts the provisions of this chapter may, by vote

of its legislative body, exempt municipal property from the regulations prescribed by the zoning commission of such city, town or borough; but unless it is so voted municipal property shall be subject to such regulations.

(b) In any municipality that is contiguous to Long Island Sound the regulations adopted under this section shall be made with reasonable consideration for restoration and protection of the ecosystem and habitat of Long Island Sound and shall be designed to reduce hypoxia, pathogens, toxic contaminants and floatable debris in Long Island Sound. Such regulations shall provide that the commission consider the environmental impact on Long Island Sound of any proposal for development.

(c) In any municipality where a traprock ridge, as defined in section 8-1aa, or an amphibolite ridge, as defined in section 8-1aa, is located the regulations may provide for development restrictions in ridgeline setback areas, as defined in said section. The regulations may restrict quarrying and clear cutting, except that the following operations and uses shall be permitted in ridgeline setback areas, as of right: (1) Emergency work necessary to protect life and property; (2) any nonconforming uses that were in existence and that were approved on or before the effective date of regulations adopted under this section; and (3) selective timbering, grazing of domesticated animals and passive recreation.

WEST'S CONNECTICUT GENERAL STATUTES UNANNOTATED TITLE 8. ZONING, PLANNING, HOUSING, ECONOMIC AND COMMUNITY DEVELOPMENT AND HUMAN RESOURCES CHAPTER 124. ZONING

Current through Gen.St., Rev. to 1-1-99

§ 8-8. Appeal from board to court. Review by appellate court

(a) As used in this section:

(1) "Aggrieved person" means a person aggrieved by a decision of a board and includes any officer, department, board or bureau of the municipality charged with enforcement of any order, requirement or decision of the board. In the case of a decision by a zoning commission, planning commission, combined planning and zoning commission or zoning board of appeals, "aggrieved person" includes any person owning land that abuts or is within a radius of one hundred feet of any portion of the land involved in the decision of the board.

(2) "Board" means a municipal zoning commission, planning commission, combined planning and zoning commission, zoning board of appeals or other board or commission the decision of which may be appealed pursuant to this section, or the chief elected official of a municipality, or his designee, in a hearing held pursuant to section 22a-250, whose decision may be appealed.

(b) Except as provided in subsections (c) and (d) of this section and sections 7-147 and 7-147i, any person aggrieved by any decision of a board may take an appeal to the superior court for the judicial district in which the municipality is located. The appeal shall be commenced

by service of process in accordance with subsections (e) and (f) of this section within fifteen days from the date that notice of the decision was published as required by the general statutes. The appeal shall be returned to court in the same manner and within the same period of time as prescribed for civil actions brought to that court.

(c) In those situations where the approval of a planning commission must be inferred because of the failure of the commission to act on an application, any aggrieved person may appeal under this section. The appeal shall be taken within twenty days after the expiration of the period prescribed in section 8-26d for action by the commission.

(d) Any person affected by an action of a planning commission taken under section 8-29 may appeal under this section. The appeal shall be taken within thirty days after notice to him of the adoption of a survey, map or plan or the assessment of benefits or damages.

(e) Service of legal process for an appeal under this section shall be directed to a proper officer and shall be made by leaving a true and attested copy of the process with, or at the usual place of abode of, the chairman or clerk of the board, and by leaving a true and attested copy with the clerk of the municipality. Service on the chairman or clerk of the board and on the clerk of the municipality shall be for the purpose of providing legal notice of the appeal to the board and shall not thereby make the chairman or clerk of the board or the clerk of the municipality a necessary party to the appeal.

(f) Service of process shall also be made on each person who petitioned the board in the proceeding, provided his legal rights, duties or privileges were determined therein. However, failure to make service within fifteen days on parties other than the board shall not deprive the court of jurisdiction over the appeal. If service is not made within fifteen days on a party in the proceeding before the board, the court, on motion of the party or the appellant, shall make such orders of notice of the appeal as are reasonably calculated to notify the party not yet served. If the failure to make service causes prejudice to the board or any party, the court, after hearing, may dismiss the appeal or may make such other orders as are necessary to protect the party prejudiced.

(g) The appeal shall state the reasons on which it has been predicated and shall not stay proceedings on the decision appealed from. However, the court to which the appeal is returnable may grant a restraining order, on application, and after notice to the board and cause shown.

(h) The authority issuing a citation in the appeal shall take from the appellant, unless the appellant is an official of the municipality, a bond or recognizance to the board, with surety to prosecute the appeal to effect and comply with the orders and decrees of the court.

(i) Within thirty days after the return date to court, or within any further time the court allows, the board shall transmit the record to the court. The record shall include, without limitation, (1) the original papers acted on by the board and appealed from, or certified copies thereof, (2) a copy of the transcript of the stenographic or

sound recording prepared in accordance with section 8-7a, and (3) the written decision of the board including the reasons therefor and a statement of any conditions imposed. By stipulation of all parties to the appeal, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for additional costs. The court may require or permit subsequent corrections or additions to the record.

(j) Any defendant may, at any time after the return date of the appeal, make a motion to dismiss the appeal. If the basis of the motion is a claim that the appellant lacks standing to appeal, the appellant shall have the burden of proving his standing. The court may, on the record, grant or deny the motion. The court's order on the motion may be appealed in the manner provided in subsection (o) of this section.

(k) The court shall review the proceedings of the board and shall allow any party to introduce evidence in addition to the contents of the record if (1) the record does not contain a complete transcript of the entire proceedings before the board, including all evidence presented to it, pursuant to section 8-7a, or (2) it appears to the court that additional testimony is necessary for the equitable disposition of the appeal. The court may take the evidence or may appoint a referee or committee to take such evidence as it directs and report the same to the court, with his or its findings of facts and conclusions of law. Any report of a referee or committee shall constitute a part of the proceedings on which the determination of the court shall be made.

(l) The court, after a hearing thereon, may reverse or affirm, wholly or partly, or may modify or revise the decision appealed from. If a particular board action is required by law, the court, on sustaining the appeal, may render a judgment that modifies the board decision or orders the particular board action. In an appeal from an action of a planning commission taken under section 8-29, the court may also reassess any damages or benefits awarded by the commission. Costs shall be allowed against the board if the decision appealed from is reversed, affirmed in part, modified or revised.

(m) Appeals from decisions of the board shall be privileged cases and shall be heard as soon as is practicable unless cause is shown to the contrary.

(n) No appeal taken under subsection (b) of this section shall be withdrawn and no settlement between the parties to any such appeal shall be effective unless and until a hearing has been held before the superior court and such court has approved such proposed withdrawal or settlement.

(o) There shall be no right to further review except to the appellate court by certification for review, on the vote of two judges of the appellate court so to certify and under such other rules as the judges of the appellate court establish. The procedure on appeal to the appellate court shall, except as otherwise provided herein, be in accordance with the procedures provided by rule or law for the appeal of judgments rendered by the superior court unless modified by rule of the judges of the appellate court.

(p) The right of a person to appeal a decision of a board to the superior court, and the procedure prescribed in this section, shall be liberally interpreted in any case where a strict adherence to these provisions would work surprise or injustice. The appeal shall be considered to be a civil action and, except as otherwise required by this section or the rules of the superior court, pleadings may be filed, amended or corrected, and parties may be summoned, substituted or otherwise joined, as provided by the general statutes.

(q) If any appeal has failed to be heard on its merits because of insufficient service or return of the legal process due to unavoidable accident or the default or neglect of the officer to whom it was committed, or the appeal has been otherwise avoided for any matter of form, the appellant shall be allowed an additional fifteen days from determination of that defect to properly take the appeal. The provisions of section 52-592 shall not apply to appeals taken under this section.

C.G.S. § 8-11

CONNECTICUT GENERAL STATUTES UNANNOTATED TITLE 8. ZONING, PLANNING, HOUSING, ECONOMIC AND COMMUNITY DEVELOPMENT AND HUMAN RESOURCES CHAPTER 124. ZONING

Current through Gen.St., Rev. to 1-1-99

§ 8-11. Disqualification of members of zoning authorities

No member of any zoning commission or board and no member of any zoning board of appeals or of any municipal agency exercising the powers of any zoning commission or board of appeals, whether existing under the general statutes or under any special act, shall appear for or represent any person, firm, corporation or other entity in any matter pending before the planning or zoning commission or board or said board of appeals or any agency exercising the powers of any such commission or board in the same municipality, whether or not he is a member of the board or commission hearing such matter. No member of any zoning commission or board and no member of any zoning board of appeals shall participate in the hearing or decision of the board or commission of which he is a member upon any matter in which he is directly or indirectly interested in a personal or financial sense. In the event of such disqualification, such fact shall be entered on the records of the commission or board and, unless otherwise provided by special act, any municipality may provide by ordinance that an elector may be chosen, in a manner specified in the ordinance, to act as a member of such commission or board in the hearing and determination of such matter, except that replacement

shall first be made form alternate members pursuant to the provisions of sections 8-1b and 8-5a.

(2)

No. 99-729

Supreme Court, U.S.
FILED
NOV 24 1999
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CITY OF WEST HAVEN, WEST HAVEN PLANNING AND ZONING COMMISSION, DONALD LEWIS and DAVID SALDIBAR,

Petitioners,

v.

GEORGE THOMAS, BARBARA THOMAS and JOHN FINNELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF JURISDICTION

Petitioners have invoked 28 U.S.C. § 1257 as the basis for this Court's jurisdiction to review the judgment of the Connecticut Supreme Court. This Court lacks jurisdiction, however, because petitioners failed properly to raise below the issue they now ask this Court to decide.

STATEMENT OF THE CASE

Respondents hereby incorporate the facts of this case as set forth within the decision of the Connecticut Supreme Court included within the petitioners' petition for certiorari. *See* Pet. App. at 1. Respondents, however, point out the following as particularly significant.

There were two hearings conducted by the petitioners which subjected respondents to rules and a process not required of other zone change applicants. During these two hearings the individual petitioners Lewis and Saldibar exhibited extreme hostility and predetermination. The first hearing occurred on May 13, 1986, at which time the petitioners insisted that in order for respondents to present their zone change request they also had to include a site plan application, despite being informed by the city's planner that no such requirement existed. Pet. App. at 12. At that hearing, both individual petitioners fully participated in the hearing and voting. Petitioner Lewis made the motion to deny the application and went out of his way to explain his motion to the rest of the commission so that they knew they were voting to deny with prejudice, meaning respondents would be barred from appearing before the commission for at least one year. Pet. App. at 14. At the second hearing on June 23, 1987 Lewis and Saldibar again exhibited extreme animosity, with

Lewis becoming so heated that Saldibar needed to calm him down. *See* Pet. App. at 15 n.19.

Respondents appealed both denials of their application to the Connecticut Superior Court. Both appeals resulted in judgment against *the entire* West Haven Planning and Zoning Commission for predetermination and bias based on the actions of Lewis and Saldibar and the denial of the application. *See* Pet. App. at 68-73 and 74-79. The zoning commission did not appeal from either judgment.

At trial in the present action, the trial court dismissed the respondents' case, not because of a failure to *state a claim*, but rather for failure to make out *a prima facie case* under state rules of practice. This was the evidentiary question that was reversed by the Connecticut Supreme Court.

REASONS FOR DENYING THE WRIT

I. THIS COURT MUST DENY THE PETITION FOR WANT OF JURISDICTION UNDER 28 U.S.C. § 1257.

This Court lacks jurisdiction under 28 U.S.C. § 1257 to consider the question presented because petitioners failed properly to raise it before the Connecticut Supreme Court and the state court did not rule on the issue. It has long been stated that where an issue is not raised and decided in the state court "the appellate jurisdiction fails." *Crowell v. Randell*, 10 Pet. 368, 391 (1836). "The rule that in cases coming from state courts this Court may review only those issues which were presented to the state court is not discretionary but jurisdictional." *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S.

308, 334 (1968) (Harlan, J. dissenting). It is additionally settled practice in this Court that "it is only in exceptional cases, and then only in cases coming from *the Federal courts*, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below." *McGoldrick v. Compagnie Gen. Transatlantique*, 309 U.S. 430, 434 (1940) (emphasis added). Finally, where the petitioner's failure to argue a constitutional contention in his brief before the state court is considered a waiver of the issue in state court, the argument cannot be entertained in this Court. *Beck v. Washington*, 369 U.S. 541, 553-54 (1962).

The equal protection issue as framed by petitioners in this case was not properly raised at the state level. Petitioners here claim for the first time in their petition for certiorari that malicious and selective treatment of an individual by government officials fails to state a claim under the Equal Protection Clause where the individual is not a member of a suspect class. *See* Pet. br. at i. This claim was not made to either the trial court or to the Connecticut Supreme Court.

At the close of respondents' case in chief, instead of proceeding with a defense, all of the petitioners[1] chose to file a motion to dismiss the respondents' claim not because of a failure to state a legitimate claim under the Equal Protection Clause, but rather for failure to make out a prima facie case under Connecticut Practice Book § 15-8.

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1. At trial and on appeal before the Connecticut Supreme Court various petitioners were represented by different counsel. The individual petitioners, Lewis and Saldibar, were represented by one attorney, and the government petitioners, City of West Haven and West Haven Planning and Zoning Commission, were represented by another. Each group submitted a separate brief in the state Supreme Court.

Pet. App. at 5 n.10. Under the Connecticut Rules of Practice, the motion by petitioners did not test the legal sufficiency of respondents' claim, but only the sufficiency of their evidence. "[W]hen the evidence produced by the plaintiff, if fully believed, would not permit the trier in reason to find the essential issues on the complaint in favor of the plaintiff, dismissal pursuant to Practice Book [§ 15-8] is appropriate." *Hinchliffe v. American Motors Corp.*, 184 Conn. 607, 609, 440 A.2d 810 (1981). In the case at bar, the Connecticut Supreme Court recognized this limitation under the motion made by petitioners when it stated: "On such a motion, the court is confined to determining whether the plaintiff's evidence, if believed and if given the benefit of all favorable inferences, makes out a prima facie case." Pet. App. at 16.

At trial and in their briefs to the Connecticut Supreme Court petitioners argued only that, viewing the evidence in the light most favorable to respondents, the respondents were not similarly situated as other zone change applicants; were not treated differently from other zone change applicants; and were not treated maliciously. Each of these claims was addressed in turn by the Connecticut Supreme Court. *See* Pet. App. at 1-34. Petitioners made no argument in their briefs or at oral argument that the respondents' failed to state a proper equal protection claim because they were not members of a protected class.

Failure of a litigant to follow proper state appellate channels and procedure is fatal to assertion of this Court's jurisdiction. *Herndon v. Georgia*, 295 U.S. 441, 443 (1935) (petitioner's "attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."); *Beaty v. Richardson*, 276 U.S. 599 (1928) (per curiam)

("Dismissed for want of jurisdiction for the reason that the federal questions sought to be presented were by the record abandoned in the State Supreme Court."). *See also Heath v. Alabama*, 474 U.S. 82, 87 (1985) (declining to consider issue raised for the first time in petition for certiorari and not briefed below); *United States v. Ortiz*, 422 U.S. 891, 898 (1975) (same). Petitioners here failed to follow proper appellate procedure under Connecticut state rules.

Connecticut Rule of Appellate Procedure § 60-5 provides that "The court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The court may in the interests of justice notice plain error not brought to the attention of the trial court." Because petitioners did not argue to the trial court below that respondents' claim was improperly brought under the rubric of equal protection, and instead argued that respondents' evidence was insufficient, they were precluded from doing so in the Connecticut Supreme Court.

Assuming arguendo that the issue had been properly preserved at the trial level, however, petitioners failed to pursue it with the state Supreme Court, which was not asked to consider and thus never decided the issue. The Connecticut Supreme Court was clear on the question it was to decide and the issues presented to it by all parties: the sufficiency of the "evidentiary showing necessary to establish a prima facie case." Pet. App. at 1. Petitioners had ample opportunity to raise before the Connecticut court the argument they now make to this Court, but they failed to take advantage of that opportunity. This failure is observed in the actions of both groups of petitioners, the individuals and the government entities.

With respect to the individual petitioners, Lewis and Saldibar, the state Supreme Court noted that they initially filed a cross-appeal in this case attempting to raise certain issues, among them qualified immunity, but the cross-appeal was properly dismissed. Pet. App. at 5-6 n.11. The individual petitioners' statement of issues filed with the cross-appeal was then treated as a statement under Connecticut Rule of Appellate Procedure § 63-4(a)(1). *Id.*

Connecticut Rule of Appellate Procedure § 63-4(a)(1) states in relevant part:

> If any appellee wishes to (A) present for review alternate grounds upon which the judgment may be affirmed, [or] (B) present for review adverse rulings or decisions of the court which should be considered on appeal in the event the appellant is awarded a new trial . . . that appellee shall file a preliminary statement of issues within twenty days from the filing of the appellant's preliminary statement of issues.

Under Connecticut rules, in the absence of a cross-appeal, section 63-4 was the only authority for petitioners to bring up any separate issues. *DiSesa v. Hickey*, 160 Conn. 250, 262-63, 278 A.2d 785, 792 (1971). The individual petitioners failed to brief the issues they raised in their preliminary statement, however, and they were considered abandoned by the state Supreme Court. *See* Pet. App. at 5-6 n.11. The individual petitioners should have included in their preliminary statement to the Connecticut Supreme Court the argument they now make that respondents' failed to state a claim under the Equal Protection Clause because of their class status. Petitioners

did not include that issue in their preliminary statement, nor did they seek to amend the statement to add their present claim as an alternate basis upon which to affirm the Connecticut trial court's decision.

Even if this Court believed petitioners' § 63-4(a)(1) statement could be read to raise the issue they now present, petitioners abandoned that issue just as they abandoned all other issues raised by failing to brief them before the Connecticut Supreme Court. "[I]ssues raised in the defendant's preliminary statement of issues which were not briefed are considered abandoned." *State v. Samaha*, 180 Conn. 565, 565 n.1, 430 A.2d 1290 (1980). *See also* Pet. App. at 5-6 n.11. And not only must the issue be raised, it must also be *adequately* briefed for consideration and decision by the Connecticut Supreme Court. *State v. Prioleau*, 235 Conn. 274, 294-95, 664 A.2d 743 (1995) (refusing to consider an issue stated "in one short paragraph" "with no legal analysis" and "no case citations or other authority to support [the] argument."). The individual petitioners failed to raise the issue in their preliminary statement, and they certainly failed to adequately brief *any* issue raised therein. The Connecticut Supreme Court expressly recognized the state rules of appellate procedure in its decision when it refused to consider the issues in petitioners' preliminary statement and instead considered them to be abandoned. Pet. App. 5-6 n.11. It is clear that had petitioners properly framed and briefed this issue to the Connecticut Supreme Court, that court would have addressed the issue in its decision.

Petitioners City of West Haven and West Haven Planning and Zoning Commission, unlike the individuals Lewis and Saldibar, never bothered even to file

a Rule 63-4(a)(1) statement. The failure of an appellee to file a preliminary statement precludes the appellee from raising any question of law in the Connecticut Supreme Court, especially if the appellant is prejudiced. *State v. Talton*, 209 Conn. 133, 142 n.12, 547 A.2d 543, 548 (1988) (judgment directed for appellant); *Myers v. Manson*, 192 Conn. 383, 398 n.12, 472 A.2d 759, 767-68 (1984); *Lynch v. Davis*, 181 Conn. 434, 437, 435 A.2d 977 (1980); *City Council of City of West Haven v. Hall*, 180 Conn. 243, 247 n.5, 429 A.2d 481, 484 (1980). There can be no doubt but that respondents here were prejudiced by petitioners' failure to raise the issue below for which they now seek this Court's review. Respondents never had an opportunity to defend before the Connecticut Supreme Court the petitioners' present claim and the record certainly was not compiled with that claim in mind. The Connecticut court was never asked to pass on the question.

This Court "will not consider a petitioner's federal claim unless it was either addressed by, or *properly presented to*, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (emphasis added). The petitioners in *Adams*, similar to the petitioners here, had failed under state appellate rules to raise their due process argument in their preliminary statement of issues before the state supreme court. *Id.* at 87-88 n.1. Instead, in their state appellate brief they had raised the issue in a context different from that presented in their petition for certiorari. *Id.* This Court dismissed the writ of certiorari as improvidently granted even though *the respondents* had discussed the due process issue in their state court brief; *id.* at 89; and even though the respondents had failed to raise a timely objection in their opposition to certiorari. *Id.* at 91. The Court noted the need for scrupulous adherence to proper

rules of procedure, even when faced with important issues. "Our continuing interest in an issue, however, does not affect the application of our Rules, because we recognize that by adher[ing] scrupulously to the customary limitations on our discretion regardless of the significance of the underlying issue, we promote respect . . . for the Court's adjudicatory process." *Id.* at 92 n.6 (internal citations and quotation marks omitted).

Petitioners here had the burden under United States Supreme Court Rule 14.1(g) to show that the issue sought to be reviewed in this Court was properly presented to the state court. *Adams*, 520 U.S. at 86-87. The Rule requires petitioners to state with specificity the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal question was raised; the method or manner of raising it; and the way in which it was passed on by the state courts. Petitioners have failed to carry their burden, and this Court lacks jurisdiction over the petition. The Connecticut Supreme Court was never asked by petitioners, nor did it consider, whether the respondents' claim was proper under the Equal Protection Clause.

Because all petitioners here failed to raise before the Connecticut Supreme Court the federal issue which they now present, petitioners abandoned this issue and this Court lacks jurisdiction under 28 U.S.C. § 1257. The petition must be denied.

II. THE CONNECTICUT SUPREME COURT'S DECISION INVOLVED ONLY EVIDENTIARY QUESTIONS RATHER THAN PLEADING ISSUES.

Intertwined within the jurisdictional argument made above is the fact that the Connecticut trial court and the Connecticut Supreme Court both ruled on evidentiary questions concerning whether respondents were similarly situated as others and were selectively treated. Petitioners attempt to minimize this fact in their petition for certiorari by making only a passing reference to the way the Connecticut Supreme Court framed the issue before it. *See* Pet. Br. at 8 n.5. Petitioners instead characterize the Connecticut decision as effectively determining the pleading standard for an equal protection claim. *Id.*

The Connecticut Supreme Court made numerous references, however, to the fact that it was only deciding the specific evidentiary question presented of whether there was a sufficient showing for a prima facie case under Connecticut Practice Book § 15-8. The Court's first sentence states, "The dispositive issue in this appeal involves the evidentiary showing necessary to establish a prima facie case of federal equal protection violations against a city, its planning and zoning commission, and certain individuals serving on the commission." Pet. App. at 1. The Connecticut Supreme Court made no ruling concerning the pleadings necessary to state a claim under Equal Protection. Indeed, the Connecticut Supreme Court was free to assume that the pleadings were adequate in light of petitioners' failure to contest them. As argued above, the petitioners only argued to the Connecticut Supreme Court that respondents' evidentiary showing was insufficient; they never argued that respondents had failed to make a sufficient claim under Equal Protection.

Petitioners urge this Court to accept this case because of the recent grant of certiorari in *Village of Willowbrook v. Olech*, 67 U.S.L.W. 3258 (U.S. Sept. 28, 1999) (No. 98-1288). *Willowbrook*, however, is a case coming from a lower federal court and does deal with the sufficiency of the pleadings when stating an equal protection claim. In that case plaintiff's complaint was dismissed by the District Court for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). *See Village of Willowbrook v. Olech*, 160 F.3d 386, 387 (7th Cir. 1998). As this Court recognized in *Adams*, respect for the Court's adjudicatory process and the need to follow the Court's customary limitations on granting certiorari mandate that petitioners strictly comply with procedural requirements despite the Court's "continuing interest in an issue." *Adams*, 520 U.S. at 92 n.6.

Additionally, the Connecticut Supreme Court's evidentiary ruling under Connecticut Practice Book § 15-8 did not make any ultimate findings as to petitioners' liability to respondents. The Court stated that "The court, on such a motion, may not make findings of fact, either favorable or unfavorable to the plaintiff." Pet. App. at 16. For example, concerning the zoning commission's selective treatment of respondents, the Court stated,

> we reiterate that whether the evidence demonstrated that the commission actually required a site plan from other applicants during the requisite time period was not the issue before the trial court on the motion to dismiss, and it is not the issue presented to us. Rather, the issue is whether the evidence presented, viewed in the light most favorable to the plaintiffs, permitted

> the inference that, during the general period of time when the plaintiffs submitted their application, a site plan was not required from those similarly situated to the plaintiffs.

Pet. App. at 21-22.

Although petitioners argue that this case presents "a fully developed factual record" that is better than *Willowbrook* to consider the equal protection issues; Pet. br. at 9; the procedural posture here and the differences between dismissal under F. R. Civ. P. 12(b)(6) and Connecticut Practice Book § 15-8 show that the two cases are not as similar as petitioners suggest and this case does not necessarily present a better record for review. First, petitioners did not contest the validity of respondents' equal protection claim. Second, as the Connecticut Supreme Court stated, the analysis under § 15-8 involves no findings of fact. Pet. App. at 16. Therefore, although this case did proceed farther in the litigation process than *Willowbrook*, the factual record is not fully developed. More of a record is not ipso facto a better record. Similarly, the petitioners never offered a defense to the equal protection claim. Had petitioners gone forward with defense of the case and offered rebuttal to respondents' claim, they might have prevailed in any event.

III. THE CONNECTICUT SUPREME COURT'S DECISION FAILS TO PRESENT THE FACTUAL PREDICATE NECESSARY TO RESOLVE PETITIONERS' POSED QUESTION CONCERNING MUNICIPAL POLICY.

Petitioners' second question presented to this Court concerning municipal policy fails to merit granting the

petition for certiorari. Despite petitioners' efforts to raise a conflict with other decisions concerning municipal policy, the case at bar fails to present a vehicle for resolution of the question posed by petitioners, and contrary to petitioners' assertions, the Connecticut Supreme Court followed this Court's well-established principles in this area of the law to resolve the evidentiary questions presented.

Petitioners first mischaracterize the holding of the Connecticut Supreme Court by erroneously stating that

> the Connecticut Supreme Court held that the personal animus of two commission members established a municipal policy of the City of West Haven sufficient to impose liability under 42 U.S.C. § 1983, even though the commission's denial of respondents' zone change application was unanimous, and even though the allegedly tainted members recused themselves from the vote.

Pet. at 10. The Court did not hold, however, that a municipal policy was derived solely from the actions of two members of the commission at a single hearing in which they recused themselves.

Rather, the Connecticut Supreme Court repeatedly asserted that it was determining the evidentiary question of whether the actions of Lewis and Saldibar constituted selective treatment of respondents and whether those actions could be inferred to have affected the rest of the zoning commission on two different occasions. After an extensive review of the evidence, the court stated: "We conclude that the evidence previously discussed, regarding how Lewis and

Saldibar, prominent members of the commission, acted toward plaintiffs *throughout the course of the zone change application review process*, would support the inference that their conduct influenced the votes of the other commissioners." Pet. App. at 28 (emphasis added). This holding was consistent with this Court's precedent that § 1983 liability is read against the background that one is responsible for the natural consequences of one's actions. *See Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986). *See also* Pet. App. at 27-28. It also demonstrates that the Connecticut Supreme Court reviewed the proceedings before the zoning commission in their entirety, rather than simply the events at a single hearing.

The holding does not purport to stand for the proposition that the unconstitutional motives of a minority of members of a public body automatically creates municipal liability based on policy. Nor does it even address the issue of how many members must possess constitutionally impermissible motives. The Court merely held that, based on the evidence presented in this case, an inference could be made that the entire commission was affected by Lewis and Saldibar, and thus there was a *prima facie* case that the two denials of respondents' application by the commission occurred with impermissible motive.

Having determined that the evidence permitted the inference that Lewis and Saldibar affected the entire zoning commission, the Connecticut Supreme Court next addressed whether the actions of the entire commission, as well as Lewis and Saldibar, constituted a municipal policy. The Connecticut court again followed this Court's well-established principles in doing so.

After discussing the requirements for municipal liability set out in *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978), *Pembauer v. Cincinnati*, 475 U.S. 469 (1986), and *St. Louis v. Praprotnik*, 485 U.S. 112 (1988), the Connecticut Supreme Court noted that petitioners had conceded that they were policymakers and also conceded that three of the four guidelines for a municipal policy identified by Justice Brennan in *Pembauer* were met. *See* Pet. App. at 30-31. Once again, the Connecticut Supreme Court was faced with an evidentiary question: whether there was sufficient evidence to support a finding of the fourth *Pembauer* requirement. Pet. App. at 31.

It is important to note that whether the petitioners were final policymakers is an issue of *state* law. *McMillian v. Monroe County*, 520 U.S. 781, 786 (1997). The Connecticut Supreme Court analyzed the state zoning statutes and the local zoning regulations and found "there is no question that, at least for the purposes of establishing a prima facie case, the inference can be drawn that *the commission* acted as a policy maker for the city with regard to denying the plaintiffs' zone change application." Pet. App. at 33 n.26 (emphasis added). The court properly looked to this Court's recent decision in *Board of County Commissioners v. Brown*, 520 U.S. 397, 405 (1997), for the proposition that where an authorized decisionmaker intentionally deprives a plaintiff of constitutionally protected rights, municipal culpability is established. *See* Pet. App. at 31-33. The Connecticut Supreme Court concluded "that the evidence supports the inference that *the actions of the commission*, with regard to its consideration of the plaintiff's zone change application, constituted a municipal policy of the city, and that, therefore, the plaintiffs had established a prima facie case against the city and the commission." *See* Pet. App. at 29 (emphasis added).

It is also worth noting that when respondents appealed the two decisions of the zoning commission to the Connecticut trial court prior to bringing the present case, the court sustained both appeals and found in both instances that the *entire zoning commission* had acted with predisposition, predetermination and bias. *See* Memorandum of Decision dated June 22, 1988 of Flanagan, J., Pet. App. at 73; Memorandum of Decision dated January 9, 1987 of Schimelman, J., Pet. App. at 77-78. The zoning commission did not appeal from either decision. While not necessarily dispositive of the constitutional violation alleged in this case, the two prior findings, if not binding as collateral estoppel, are at the least persuasive evidence that a trier of fact could infer a *prima facie* case from the evidence presented. Thus, the Connecticut Supreme Court's decision that the evidence permitted an inference that the entire commission acted illegally was correct and consistent with earlier lower court proceedings.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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FILED
DEC 3 1999
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No. 99-729

In The

Supreme Court of the United States

CITY OF WEST HAVEN, WEST HAVEN PLANNING AND ZONING COMMISSION, DONALD LEWIS, AND DAVID SALDIBAR,

Petitioners,

v.

GEORGE THOMAS, BARBARA THOMAS, AND JOHN FINNELL,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Connecticut

PETITIONERS' REPLY BRIEF

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REPLY BRIEF FOR PETITIONERS

Respondents' Opposition is more significant for what it does not say, than for what it does say. Respondents do not dispute that *each* of the questions presented in the Petition are questions of substantial importance about which federal and state courts are in conflict. Respondents' failure to contest the existence of a conflict on the first question presented involving the scope of the Equal Protection Clause is not surprising in light of the Court's grant of a writ of certiorari on that precise issue in *Village of Willowbrook v. Olech*, 67 U.S.L.W. 3528 (U.S. Sept. 28, 1999) (No. 98-1288). Notably, however, Respondents also do not deny that the Connecticut Supreme Court's decision on the second question presented – whether an allegedly tainted minority of a unanimous zoning board can render a municipality liable under 42 U.S.C. § 1983 – is (along with a similar holding of the Massachusetts Supreme Judicial Court) in direct conflict with decisions of the Sixth, Ninth and Eleventh Circuits. As Respondents concede by their silence, each of those circuit courts have held that to prevail on a § 1983 claim against a municipality, a plaintiff must show bias on the part of a *majority* of board members. *See* Pet. at 13-16. The need to resolve this clear conflict among federal and state courts is of great importance to all municipalities. Respondents do not suggest otherwise.

Instead, Respondents present the Court with a variety of purported procedural concerns in an effort to deflect the Court's attention from the substance of the questions presented. Respondents' claims, which in large measure reduce to a single argument, have no merit. Each of the questions presented was squarely decided by the

court below and is properly reviewable by the Court. Accordingly, Petitioners request that the Court grant the Petition on both of the questions presented or, at a minimum, hold pending the Court's decision in *Village of Willowbrook*.

1. Respondents wrongly assert that the Court lacks jurisdiction over the first question presented because Petitioners' Equal Protection Clause arguments in the Connecticut Supreme Court were not framed in the same fashion as they are advanced in the Petition. However, regardless whether Petitioners themselves raised the first question presented in the state court, it cannot be disputed that the Connecticut Supreme Court did, in fact, consider and decide the issue. That is all that is necessary to provide the Court with jurisdiction over the question presented.

In *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991), the Court rejected an argument identical to Respondents' when it held that "[i]t is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided." This same point is made in the cases relied on by Respondents. *See, e.g., Adams v. Robertson*, 520 U.S. 83, 86 (1997) (the Court will not consider a petitioner's federal claim "unless it was either *addressed by*, or properly presented to, the state court") (emphasis added); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940) (noting that jurisdictional rule relied on by Respondents applies only to questions not "pressed *or passed upon* in the courts below") (emphasis added). As Justice Harlan noted in an opinion cited by

Respondents, "[w]here the highest state court has actually ruled on a federal question, this Court's concern with the proper raising of the question in the state court disappears." *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308, 334 n.2 (1968) (Harlan, J., dissenting) (citations omitted).

There can be no question that the Connecticut Supreme Court "actually ruled" on the precise issue presented in the first question – namely, that a plaintiff can establish a violation of the federal Equal Protection Clause by showing selective treatment motivated by personal animus alone and not because of plaintiff's membership in a suspect class or exercise of any fundamental constitutional rights. Relying on "recent decisions of the Court of Appeals of the Second Circuit for guidance *on the issues presented in the present case*," Pet. App. at 8 (emphasis added), the court made the following ruling on federal law:

> A violation of equal protection by selective [treatment] arises if: (1) the person, compared with others similarly situated, was selectively treated; and (2) . . . such selective treatment was based on the impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, *or* malicious or bad faith intent to injure a person.

Id. at 8-9 (citations omitted) (emphasis added). The Connecticut Supreme Court thus expressly adopted the construction of the Equal Protection Clause endorsed by the Second Circuit in *LeClair v. Saunders*, 627 F.2d 606 (2d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981), and the Seventh Circuit in *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995),

one that is directly contrary to the Sixth Circuit's decision in *Futernick v. Sumpter Tp.*, 78 F.3d 1051 (6th Cir.), *cert. denied*, 519 U.S. 928 (1996).

The Connecticut Supreme Court's ruling on the scope of the Equal Protection Clause was not only explicit, it was also essential to the court's consideration of the sufficiency of Respondents' claims. For without that ruling, the court would have had no legal standard against which to measure the validity of Respondents' equal protection claims. In seeking review of the Connecticut Supreme Court's legal ruling on the scope of the federal Equal Protection Clause, Petitioners do no more than ask the Court to "dispose of the case on the constitutional premise raised below, reaching the result by a method of analysis readily available to the state court." *Stanley v. Illinois*, 405 U.S. 645, 658 n.10 (1972).

Contrary to Respondents' claims, "[p]arties are not confined [in this Court] to the same arguments which were advanced in the courts below upon a federal question there discussed." *Dewey v. City of Des Moines*, 173 U.S. 193, 198 (1899); *see* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 3.20, at 137 (7th ed. 1993) [hereinafter Supreme Court Practice]. Rather, parties may enlarge upon questions presented so long as the enlargements are fairly included within the issues considered below. *See Illinois v. Gates*, 462 U.S. 213, 219-220 (1983) (citing *Dewey*, 173 U.S. at 197-98); Supreme Court Practice *supra*, at 137. As the Connecticut Supreme Court and Respondents note, *see* Pet. App. 1-34; Opp. at 4, both parties briefed numerous aspects of the equal protection issues; indeed, by the time the case arrived in that court, Respondents' equal protection claim was the *only* claim remaining in

the case. *See* Pet. App. at 5 n.9. Because the first question presented by Petitioners was fairly included within the issues raised below and was expressly decided by the Connecticut Supreme Court, the Court has jurisdiction to decide the question.

2. Respondents make a second argument regarding the propriety of reviewing the first question presented, but upon examination, it is apparent that their second argument is nothing more than a variant of their first claim and it should be rejected for the same reasons.

Respondents disingenuously claim that the Connecticut Supreme Court never ruled on a federal question but decided only a state-law evidentiary issue. *See* Opp. at 3-7.[1] As the excerpt quoted above shows, however, the Connecticut Supreme Court most certainly did rule directly on the federal legal question of the scope of the Equal Protection Clause before proceeding to assess the sufficiency of Respondent's equal protection claims.

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[1] It is difficult to understand what point Respondents believe they are making with their repeated statement that the Connecticut Supreme Court decided only whether they had made out a *prima facie* case, not whether they had pleaded a proper claim. In Connecticut, like every other jurisdiction, a plaintiff makes out a *prima facie* case by adducing sufficient evidence of each of the elements of his cause of action. In order to make that determination, however, a court first must determine the proper legal elements of the claim. It is the Connecticut Supreme Court's determination of the legal elements of a federal equal protection claim and the legal requirements for imposing § 1983 liability on a municipality, *see infra* at 6-8, that are the bases of the Petition. Whether the court decided those federal questions on a motion to dismiss or on a motion for directed verdict is irrelevant.

Indeed, the Connecticut Supreme Court ruled on the identical issue set forth in the first question presented in the Petition.

To be sure, the court then went on to discuss whether Respondents' evidence of malice and selective treatment was sufficient to submit the case to a jury. But Petitioners have not asked this Court to decide whether Respondents' evidence was sufficient to prove personal animus or selective treatment. Instead, Petitioners have asked the Court to review the Connecticut Supreme Court's predicate legal ruling that the protections of the Equal Protection Clause extend to individuals who are selectively treated solely because of the personal animus of a local or state official, regardless whether the plaintiff is a member of a suspect class or was exercising any fundamental constitutional rights. *See* Pet. at i. It is only by ignoring both the question presented in the Petition and the Connecticut Supreme Court's legal ruling on that federal issue that Respondents can possibly make this meritless argument. The Court should reject it.

3. Finally, without disputing the importance of the second question presented regarding municipal liability under § 1983 or the existence of a conflict among lower courts on that issue, Respondents deny that the Connecticut Supreme Court ever ruled on that question. Claiming that all that court decided was a state-law question regarding the proof necessary to make out a *prima facie* case, *see* Opp. at 12-13, Respondents once again ignore both the question presented and the Connecticut Supreme Court's ruling regarding the scope of municipal liability under § 1983.

In fact, the parties joined issue on precisely this question before the Connecticut Supreme Court. In earlier proceedings, the trial court had specifically held that Respondents' evidence consisted solely of improper motive on the part of the individual Petitioners Saldibar and Lewis, and that Respondents had "failed to produce evidence from the [other] commissioners that the actions of Lewis and Saldibar affected their decision." Pet. App. at 56 n.9. Drawing on that finding and this Court's decision in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), the municipal Petitioners argued that

> [a] finding that two Planning and Zoning Commissioners individually held malice against the plaintiffs in no way amounts to official policy under the line of Supreme Court rulings. . . . The *Prapotnick* [sic] constitutional analysis requiring proof of policy or custom becomes more obvious when examined from the view that the two commissioners took no part in the final vote. The City and Commission, therefore, cannot be said to have adopted a policy of unequal protection of plaintiffs' rights."

Defs. City's & Commission's Br. at 7, *Thomas v. City of West Haven*, 249 Conn. 385, 734 A.2d 535 (1999) (S.C. 15843) (citations omitted). In reply, Respondents argued that "[b]ecause Plaintiffs proved a prima facie case that Saldibar and Lewis intentionally acted maliciously and thereby caused the denial of their equal protection rights, they have also established a case of municipal liability." Pls.' Reply Br. at 11-12. The parties thus presented the Connecticut Supreme Court with the second question set forth in the Petition.

The court decided that question as well. For in order to determine whether Respondents had made out a *prima facie* case against the City, the court necessarily decided that evidence of malice on the part of only two commission members, each of whom had recused themselves, was sufficient to give rise to municipal liability under § 1983. Moreover, the court reached that decision in the absence of any evidence of any impermissible motive on the part of the other members of the commission or that they had in any way delegated their policymaking authority to Petitioners Saldibar and Lewis. *See* Pet. App. at 34.[2] By reversing the trial court's judgment for the City, the Connecticut Supreme Court answered that question in the affirmative. The court thus entered the longstanding and widespread conflict among federal and state appellate courts regarding the scope of municipal liability under § 1983 for the actions of individual commission members over whom municipalities have no effective control. *See* Pet. at 12-17.

Respondents' focus on the Connecticut Supreme Court's application of this Court's holdings in *McMillian v. Monroe County*, 520 U.S. 781 (1997), and *Board of County Commissioners v. Brown*, 520 U.S. 397 (1997), misses the

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[2] Respondents suggest that the decisions in the zoning appeals determined, as a matter of collateral estoppel law, that the *entire* commission acted illegally for purposes of § 1983. *See* Opp. at 16. Respondents neglect to say, however, that they made that identical argument to both the trial court and the Connecticut Supreme Court, and neither accepted it. The zoning decisions are not even referred to in the Connecticut Supreme Court's discussion of municipal liability under § 1983. *See* Pet. App. at 28-34.

point of the second question presented. At no point in these proceedings have Petitioners contested that, under Connecticut law, the zoning commission acts as a final policymaker for the purpose of zoning decisions in the City of West Haven. Nor do they dispute this Court's holding that the intentional deprivation of a plaintiff's civil rights by a final policymaker establishes municipal culpability under § 1983.

What Petitioners do dispute, did contest below, and now ask this Court to review is the Connecticut Supreme Court's determination that a plaintiff may impose liability on a municipality under § 1983 merely by proving impermissible motive on the part of a minority of the members of a final policymaking body – members who, without doubt, are not themselves final policymakers under state law. As the Ninth and Eleventh Circuits both recognize, such a holding runs counter to this Court's rejection of *respondeat superior* as a basis for municipal liability in *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978). *See Church v. City of Huntsville*, 30 F.3d 1332, 1342-44 (11th Cir. 1994); *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1239 (9th Cir. 1994); *see also* Pet. at 26-29. This case presents an ideal vehicle for resolving that conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Dated: December 3, 1999

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